From: Newell, Russell
To: John Bockmier; Faith Vander Voort; Daniel Jorjani
Subject: NYT Ethics Story - Assessment of Actions Taken
Date: Saturday, February 9, 2019 11:20:59 AM
Attachments: NYT Summary.docx

All - attached and below is my assessment of everything that has transpired regarding our activities related to the NYT article thus far. For your review. Attached Word doc formatting will be better than the cut and paste below.

Russell

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Cc:	Faith Vander Voort; Daniel Jorjani; todd_willens@ios.doi.gov; kate_macgregor@ios.doi.gov; james_cason@ios.doi.gov
Subject:	Re: NYT Ethics Story - Assessment of Actions Taken
Date:	Saturday, February 9, 2019 11:23:17 AM

Tremendous overview Russell. Copying Todd, Kate and Jim. Thanks so much for putting this together.

Sent from my iPhone

John M Bockmier
Department of Interior
Director of Communications
1849 C Street, N.W.
Washington, DC
20240

202.208.3636 Office
202.897.7366 Cell

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Subject: Fwd: NYT Ethics Story - Assessment of Actions Taken
Date: Saturday, February 9, 2019 11:34:51 AM
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Privileged & Confidential
ACP

Comms Post-Mortem below -

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NY Times is working on an article that will focus on David Bernhardt's ethics – specifically whether he broke the Trump Ethics Pledge by not recusing himself from the subject matter area of California Water, Section 4002 of Public Law 114-322, and whether Acting Secretary Bernhardt's prior lobbying on Section 4002 subjects him to the restrictions of paragraph 7 of the administration ethics pledge.

The DOI Office of Communications spent a great deal of time with the reporter, Coral Davenport, educating her on why Acting Secretary Bernhardt did not break the ethics pledge and why he is not subject to the restrictions of paragraph 7. This included facilitating four hours of phone conversions with senior DOI ethics officials, sharing multiple documents, and coordinating an on-the-record interview with the Acting Secretary. Davenport said that the conversations OCO and ethics absolutely educated her reporting and helped reshape the story, moving it from one that was ready to claim Acting Secretary Bernhardt broke the pledge, to one that will conclude he did not.

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From: Daniel Jorjani
To: Newell, Russell
Cc: John Bockmier; Faith Vander Voort
Subject: Re: NYT Ethics Story - Assessment of Actions Taken
Date: Saturday, February 9, 2019 11:40:36 AM

Russ - Truly superb.

Sent from my iPhone

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U.S. Department of the Interior
(202) 208-6232
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<NYT Summary.docx>

From: Russell Newell
To: Daniel Jorjani
Cc: John Bockmier; Faith Vander Voort
Subject: Re: NYT Ethics Story - Assessment of Actions Taken
Date: Saturday, February 9, 2019 12:23:23 PM

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From: Todd Willens
To: Daniel Jorjani
Subject: Re: NYT Ethics Story - Assessment of Actions Taken
Date: Monday, February 11, 2019 11:50:49 AM

Let's talk.

Todd Willens
Acting Chief of Staff
Associate Deputy Secretary
U.S. Department of the Interior
1849 C Street, NW - MIB Room 6136
Washington, DC 20240

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> Privileged & Confidential
> ACP
>
> Comms Post-Mortem below -
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> Begin forwarded message:
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> **From:** "Newell, Russell" <russell_newell@ios.doi.gov>
> **Date:** February 9, 2019 at 11:20:46 AM EST
> **To:** John Bockmier <john_bockmier@ios.doi.gov>, Faith Vander Voort <faith_vandervoort@ios.doi.gov>, Daniel Jorjani <daniel.jorjani@sol.doi.gov>
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However, the official conceded that other ethics experts who disagree have a reasonable argument.

We have requested that she take out the word "technically."

We have asked her to strike the last sentence. If she will not strike, we have offered the below as a more accurate representation of Scott's thinking:

However, the official noted that it is possible that other ethics experts could reasonably arrive at a different conclusion.

###

Russell Newell
Deputy Director of Communications
U.S. Department of the Interior
(202) 208-6232
@Interior

<mime-attachment.html>

<NYT Summary.docx>

From: Faith Vander Voort
To: b6 David ; todd_willens@ios.doi.gov
Bcc: daniel.jorjani@sol.doi.gov
Subject: NYT
Date: Tuesday, February 12, 2019 4:12:25 AM

---

https://www.nytimes.com/2019/02/12/climate/david-bernhardt-endangered-species.html?rref=collection%2Fbyline%2Fcoral-davenport&action=click&contentCollection=undefined&region=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection

Sent from my iPhone

From: Daniel Jorjani
To: Faith Vander Voort
Subject: Re: NYT
Date: Tuesday, February 12, 2019 7 03:01 AM

Sent from my iPhone

On Feb 12, 2019, at 4:12 AM, Faith Vander Voort <faith_vandervoort@ios doi gov> wrote:

> https://www nytimes com/2019/02/12/climate/david-bernhardt-endangered-species html?rref=collection%2Fbyline%2Fcoral-davenport&action=click&contentCollection=undefined&region=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection
>
> Sent from my iPhone

From: Daniel Jorjani
To: Scott de la Vega; heather.gottry@sol.doi.gov
Subject: Top Leader at Interior Dept. Pushes a Policy Favoring His Former Client - The New York Times
Date: Tuesday, February 12, 2019 7:06:05 AM

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https://www.nytimes.com/2019/02/12/climate/david-bernhardt-endangered-species html

Sent from my iPhone

From:	Daniel Jorjani
To:	Brandon Middleton; carter.brown@sol.doi.gov
Subject:	Top Leader at Interior Dept. Pushes a Policy Favoring His Former Client - The New York Times
Date:	Tuesday, February 12, 2019 7:06:17 AM

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https://www.nytimes.com/2019/02/12/climate/david-bernhardt-endangered-species html

Sent from my iPhone

From:	Gottry, Heather
To:	Daniel Jorjani
Cc:	Scott De La Vega; Edward McDonnell
Subject:	Draft Ethics Guidance on CVP and SWP - 2019 BA and Draft NOI EIS
Date:	Friday, February 15, 2019 6:21:54 PM
Attachments:	DEO CVP and SWP Analysis (Updated Draft for Review 2-15-19).docx

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Dan - Attached for your reference is the current version of our draft memo analyzing whether the Draft EIS NOI for the Coordinated LTO of the CVP and SWP and the Reinitiation of Consultation on the Coordinated LTO of the CVP and SWP - Biological Assessment are matters, particular matters of general applicability, or particular matters involving specific parties under the ethics laws and regulations.

We discussed this with David in our meeting this morning and he asked to review the current draft version. The attached memo has also been reviewed by Carter and Peg and we incorporated their minor technical edits. Please do not hesitate to let us know if you have any edits, comments or questions, or if it would be helpful to schedule a time to discuss further. Thank you.

- Heather

--

Heather Gottry

Deputy Director, Program Management & Compliance

Departmental Ethics Office | Office of the Solicitor

U.S. Department of the Interior | MIB 5317

(O) (202) 208-4472

(C) (202) 740-0417

heather.gottry@sol.doi.gov

Visit us online at: www.doi.gov/ethics

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MEMORANDUM

TO: Scott A. de la Vega, Director, Departmental Ethics Office & Designated Agency Ethics Official

FROM: Heather C. Gottry, Deputy Director for Program Management and Compliance, Departmental Ethics Office & Alternate Designated Agency Ethics Official

Edward McDonnell, Deputy Director for Ethics Law and Policy, Departmental Ethics Office

DATE: February __, 2019

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[redacted]

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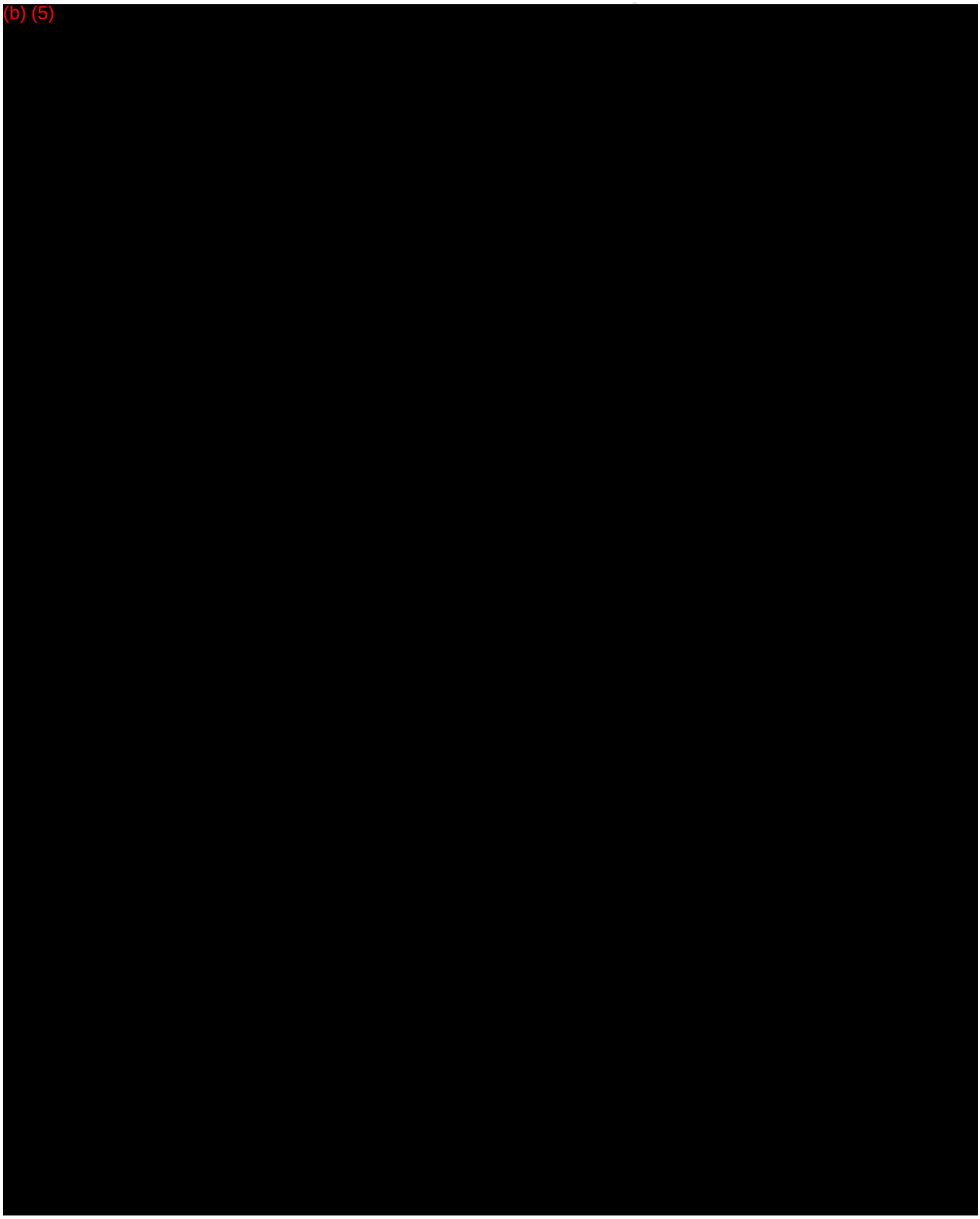

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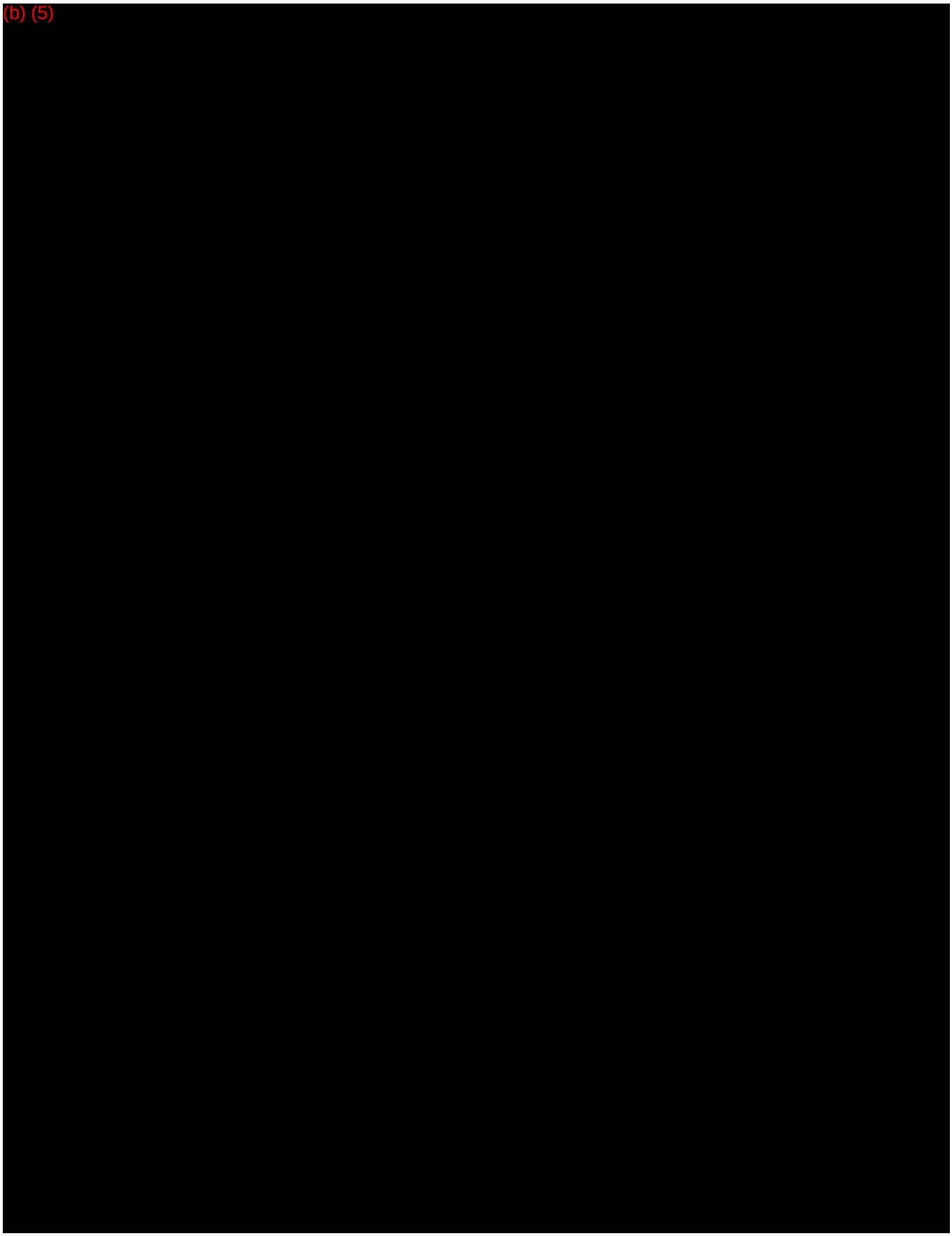

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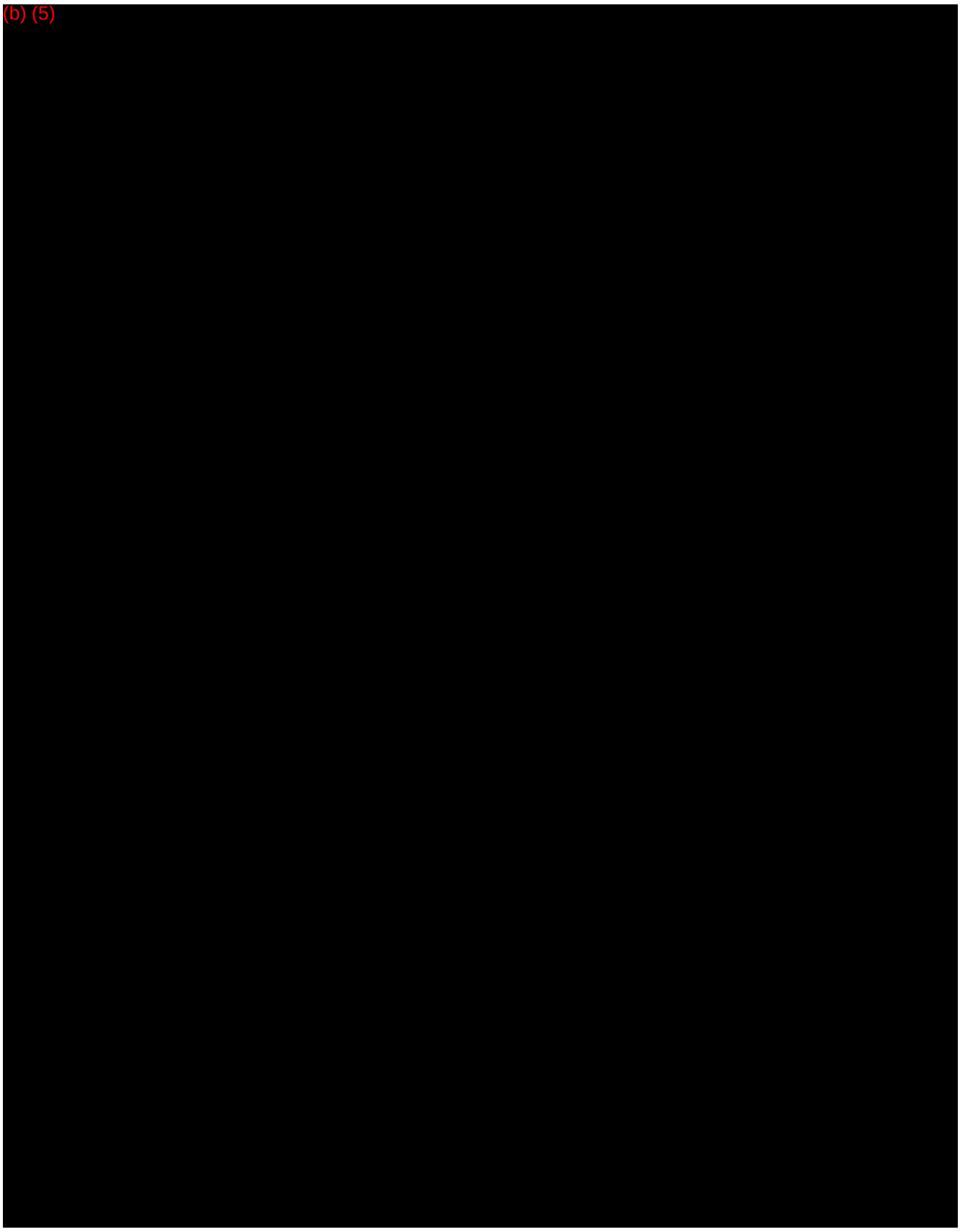

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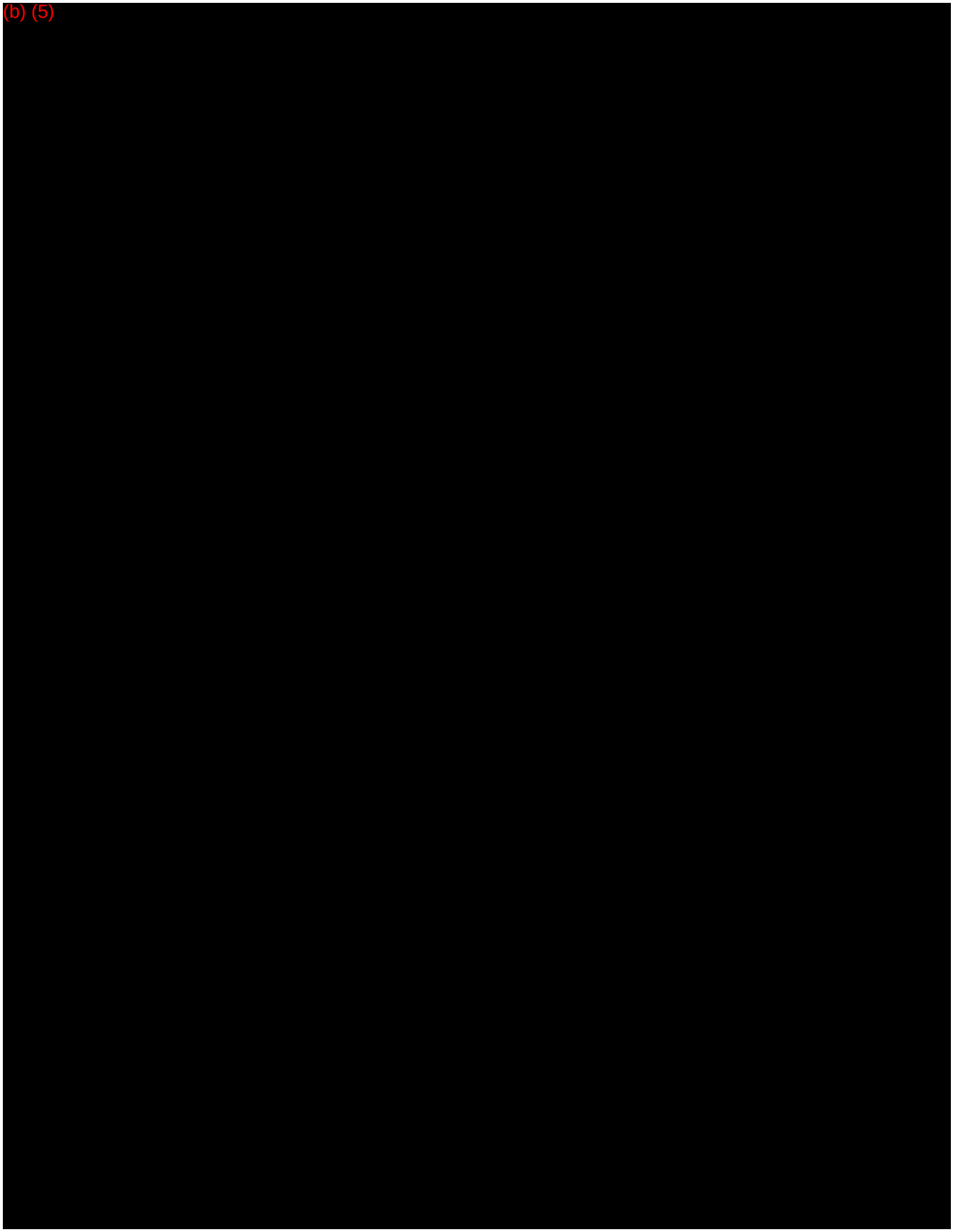

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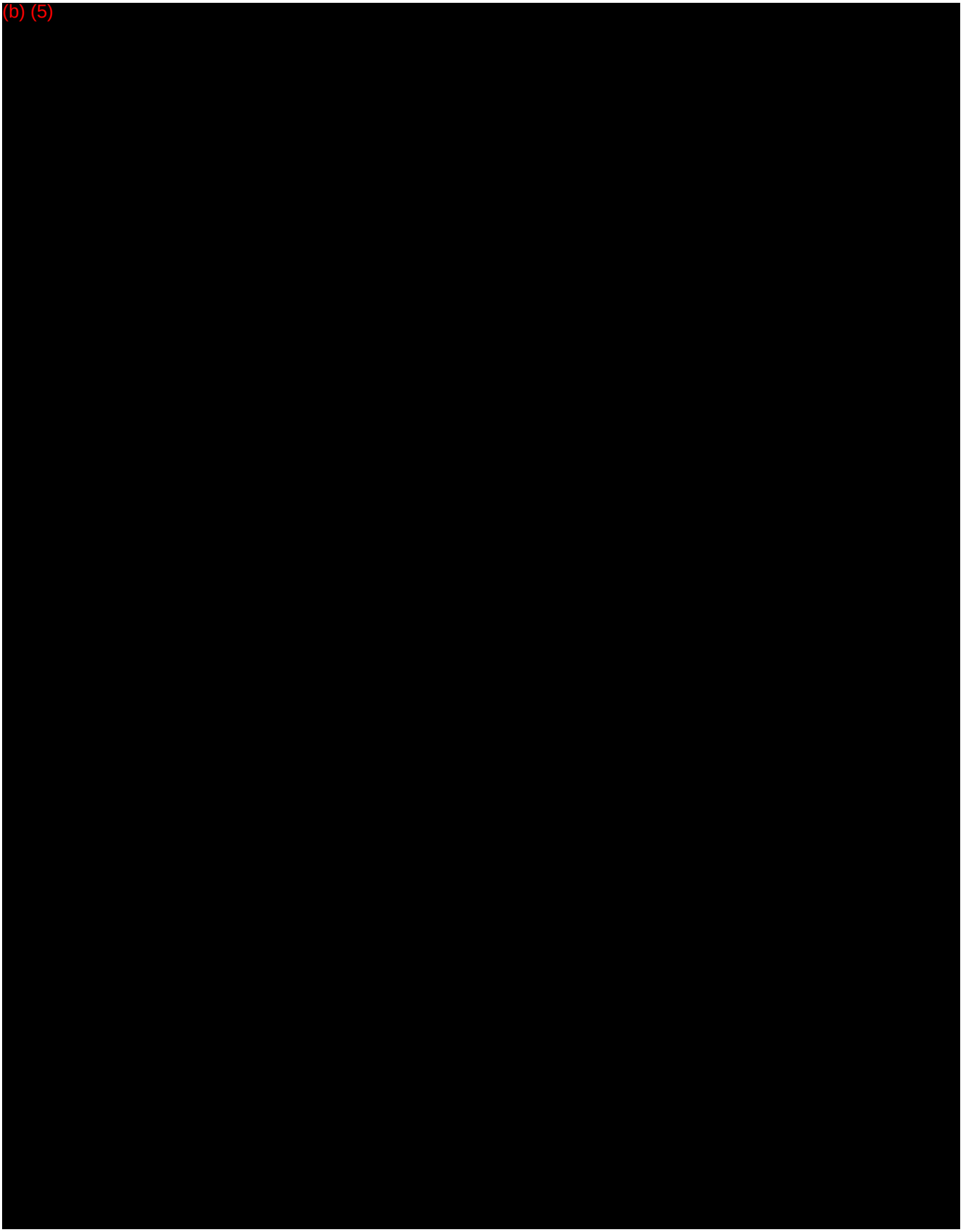

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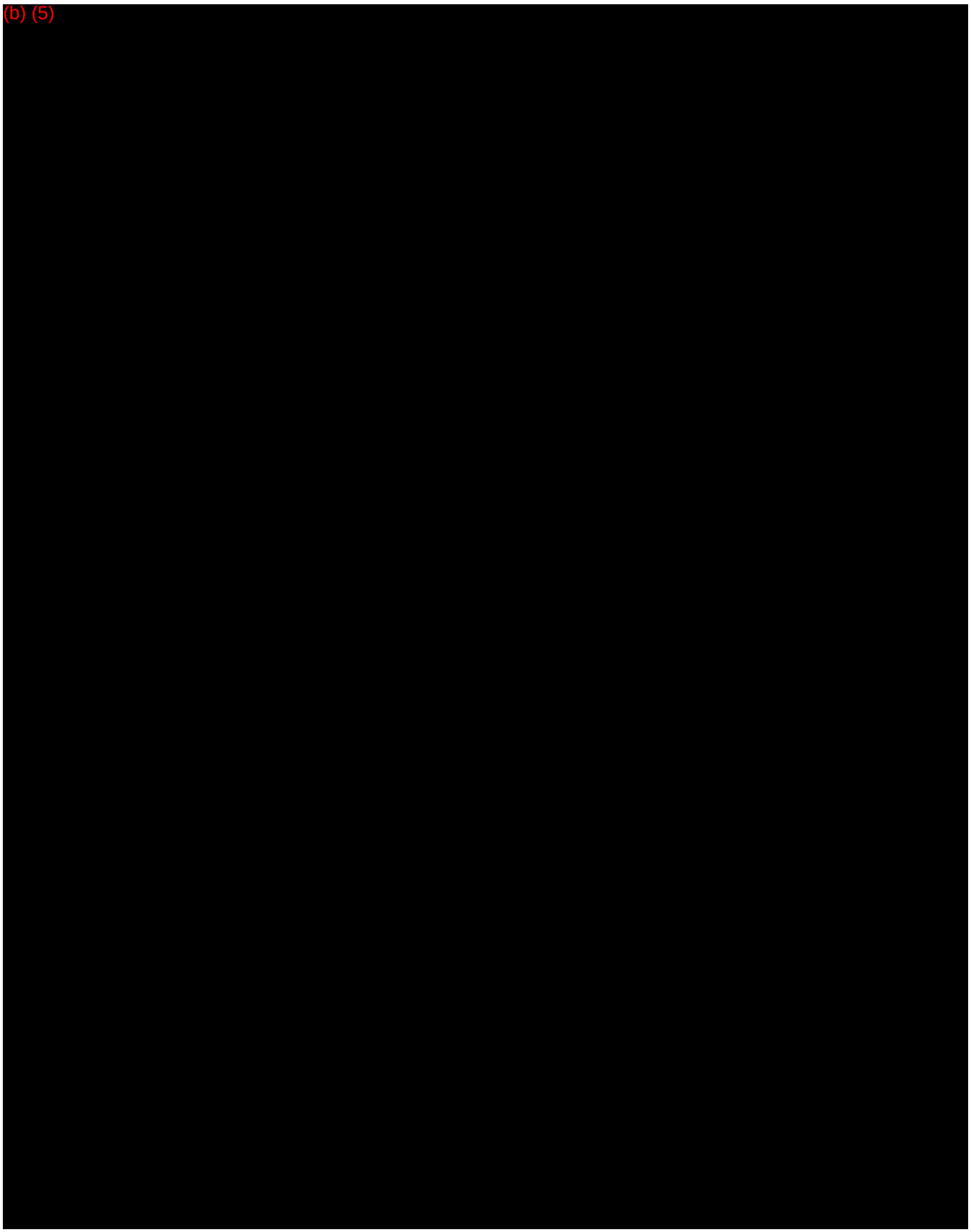

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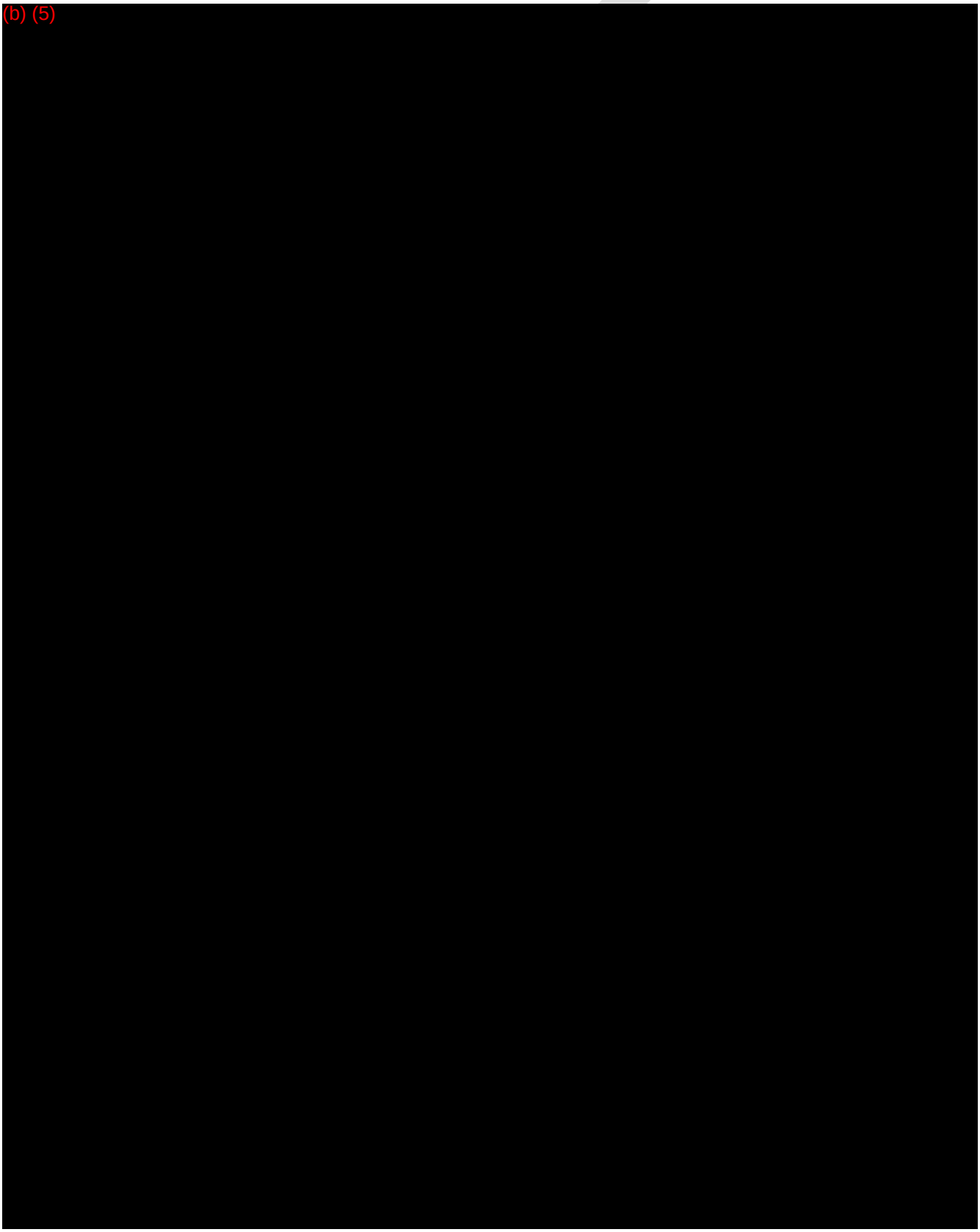

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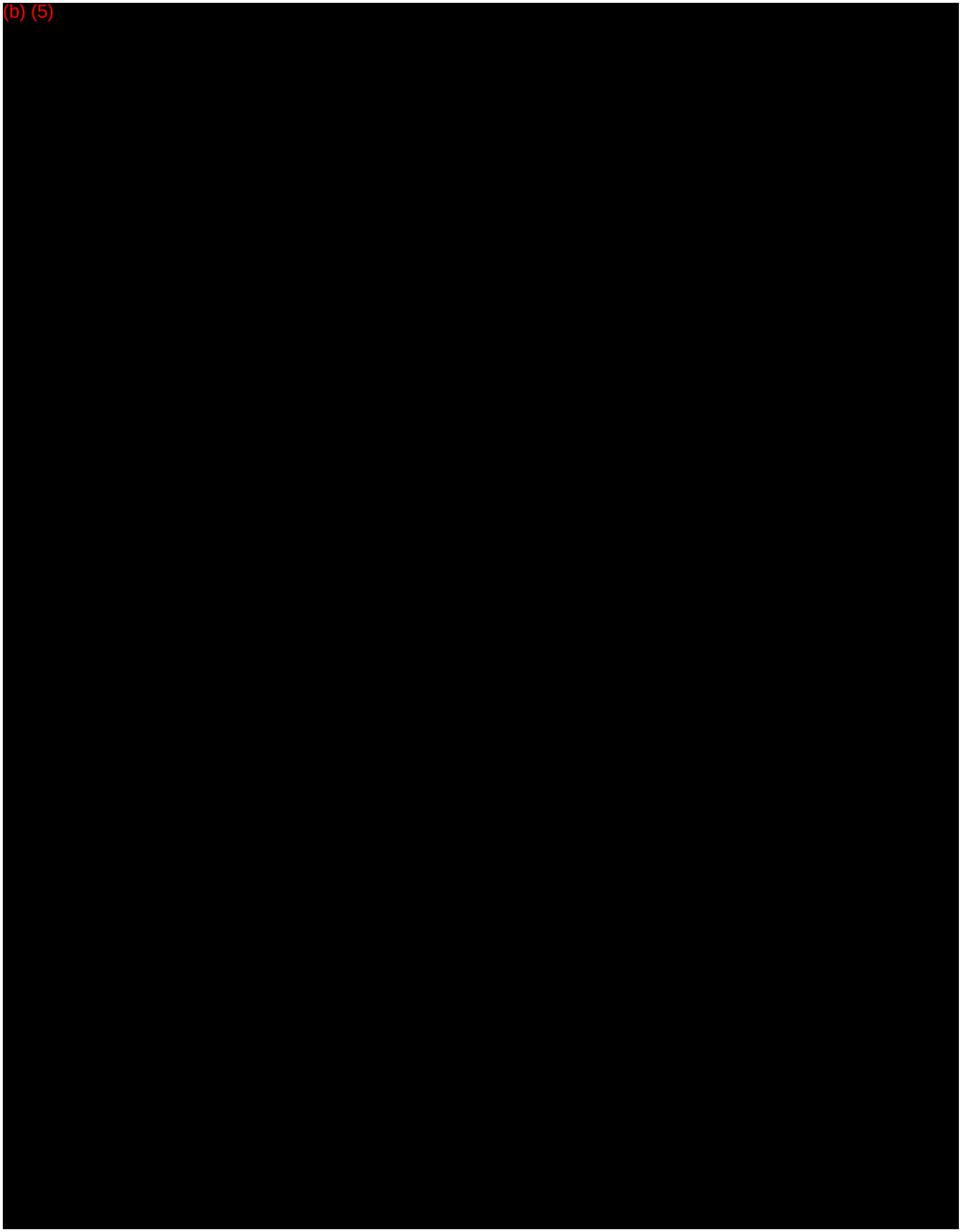

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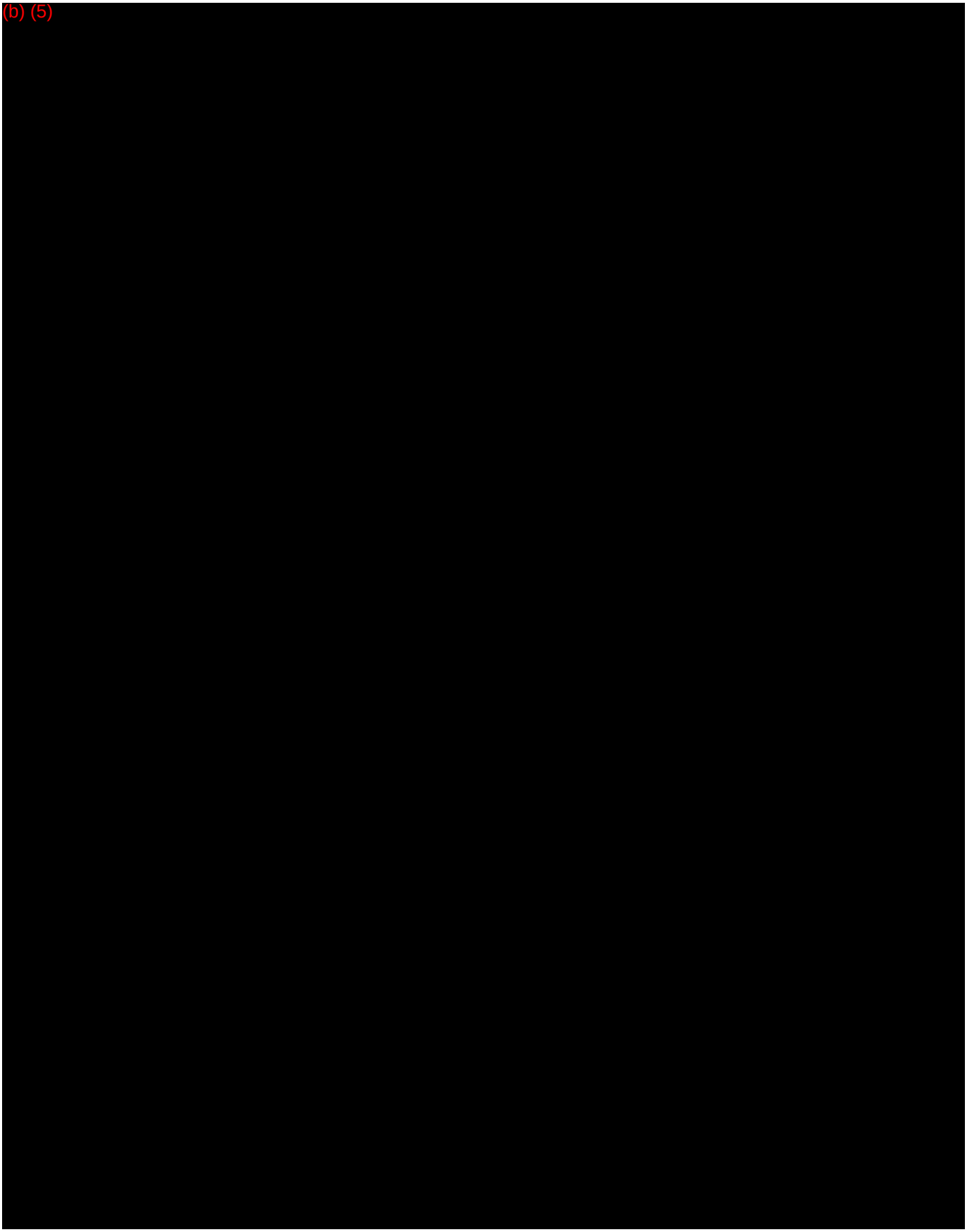

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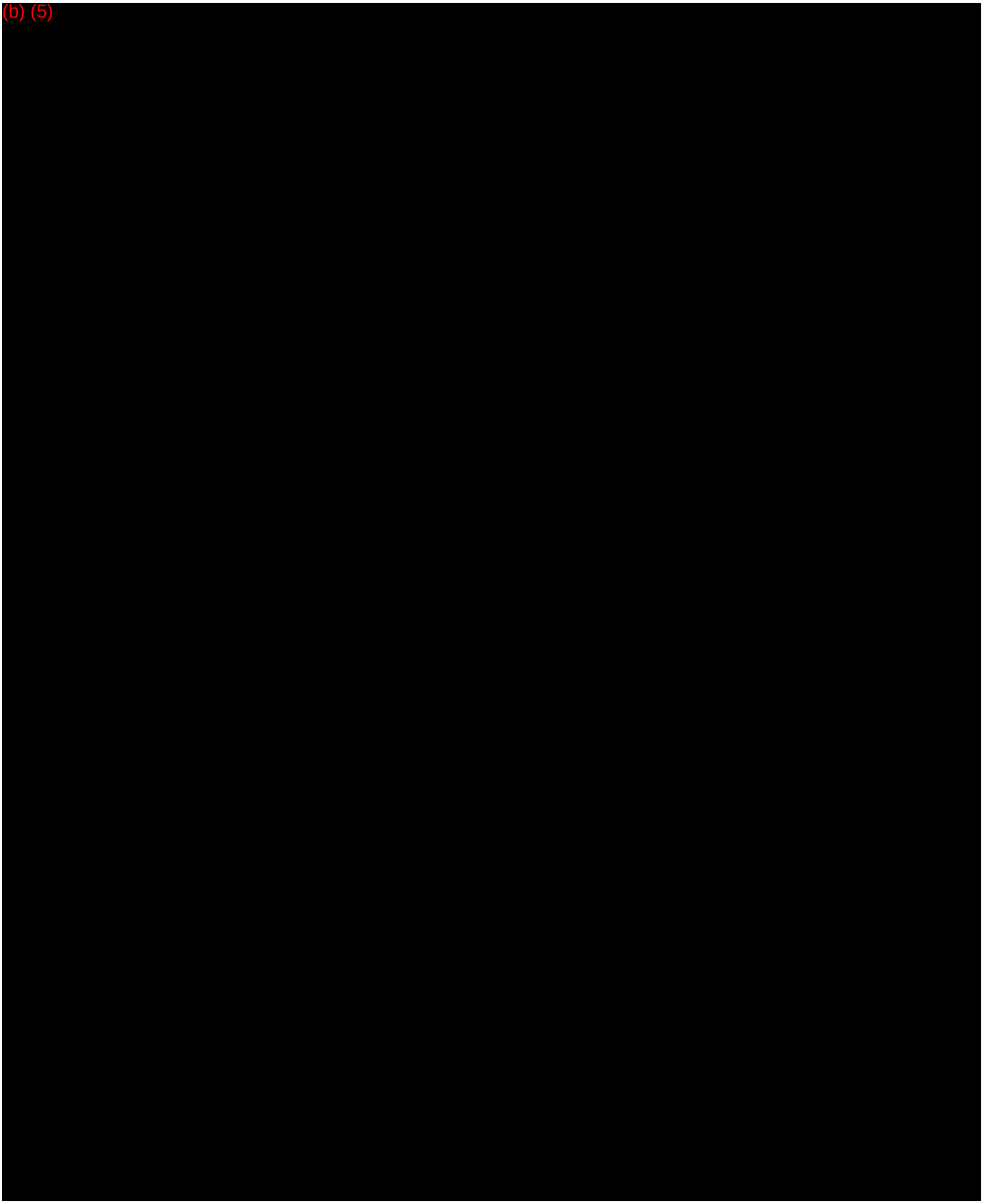

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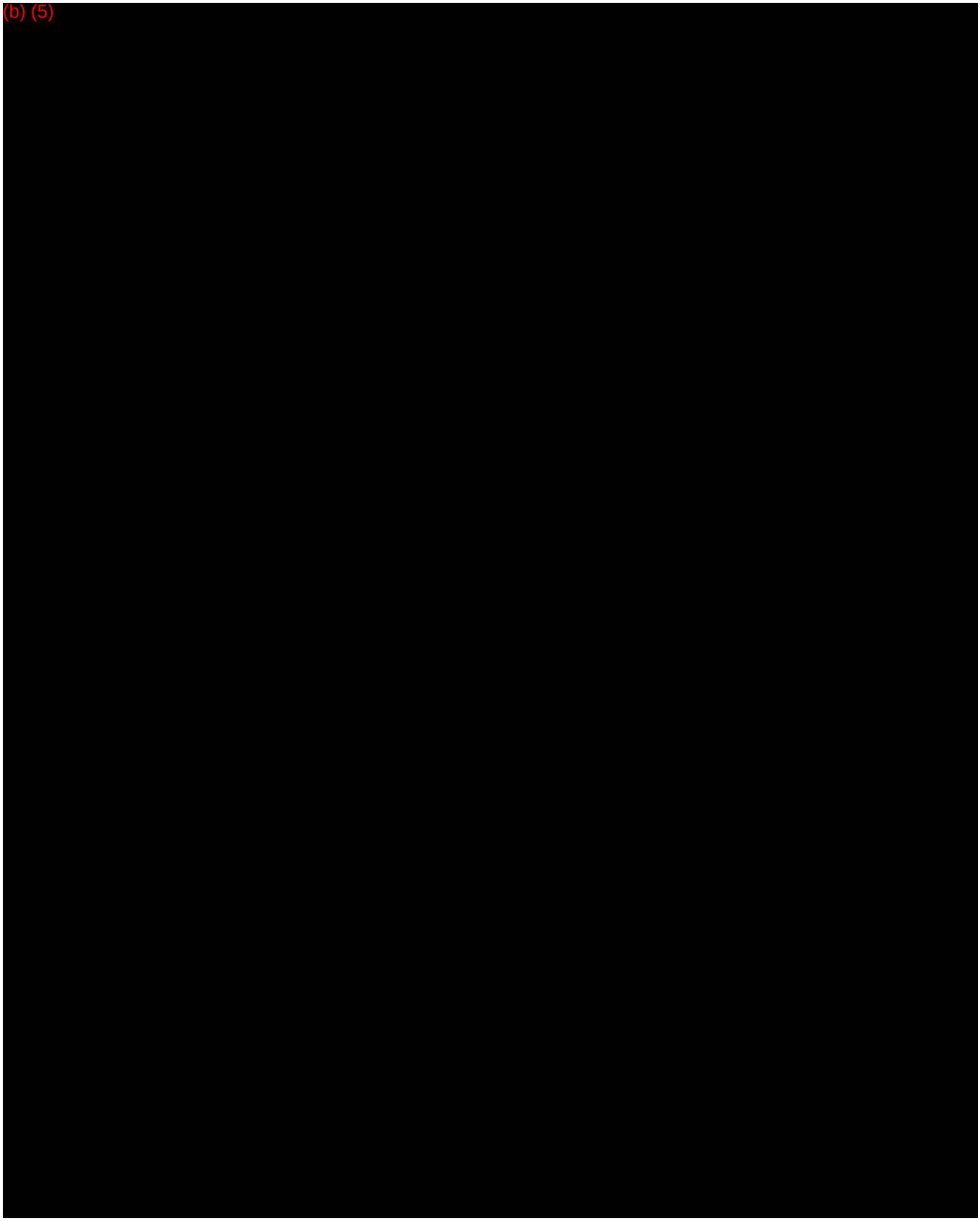

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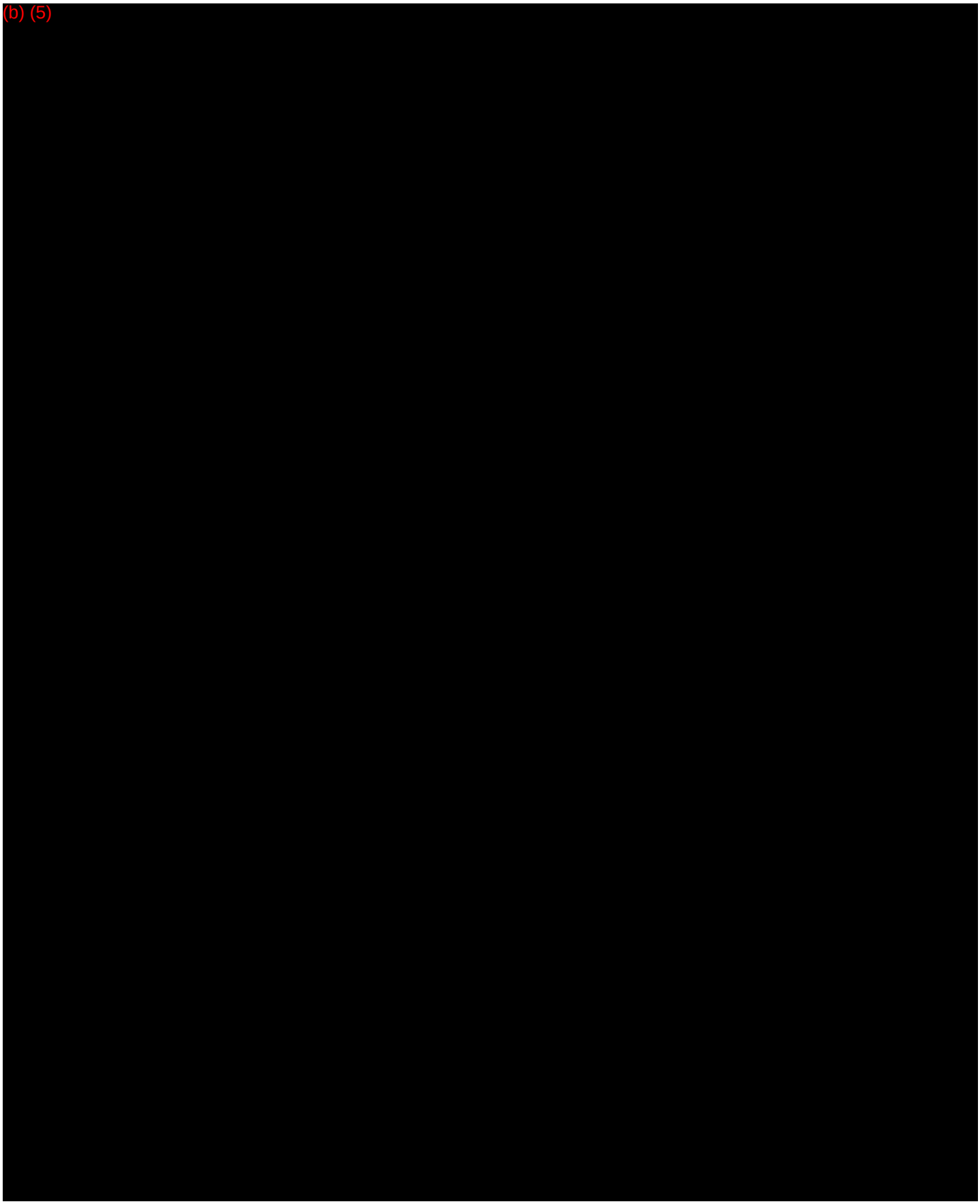

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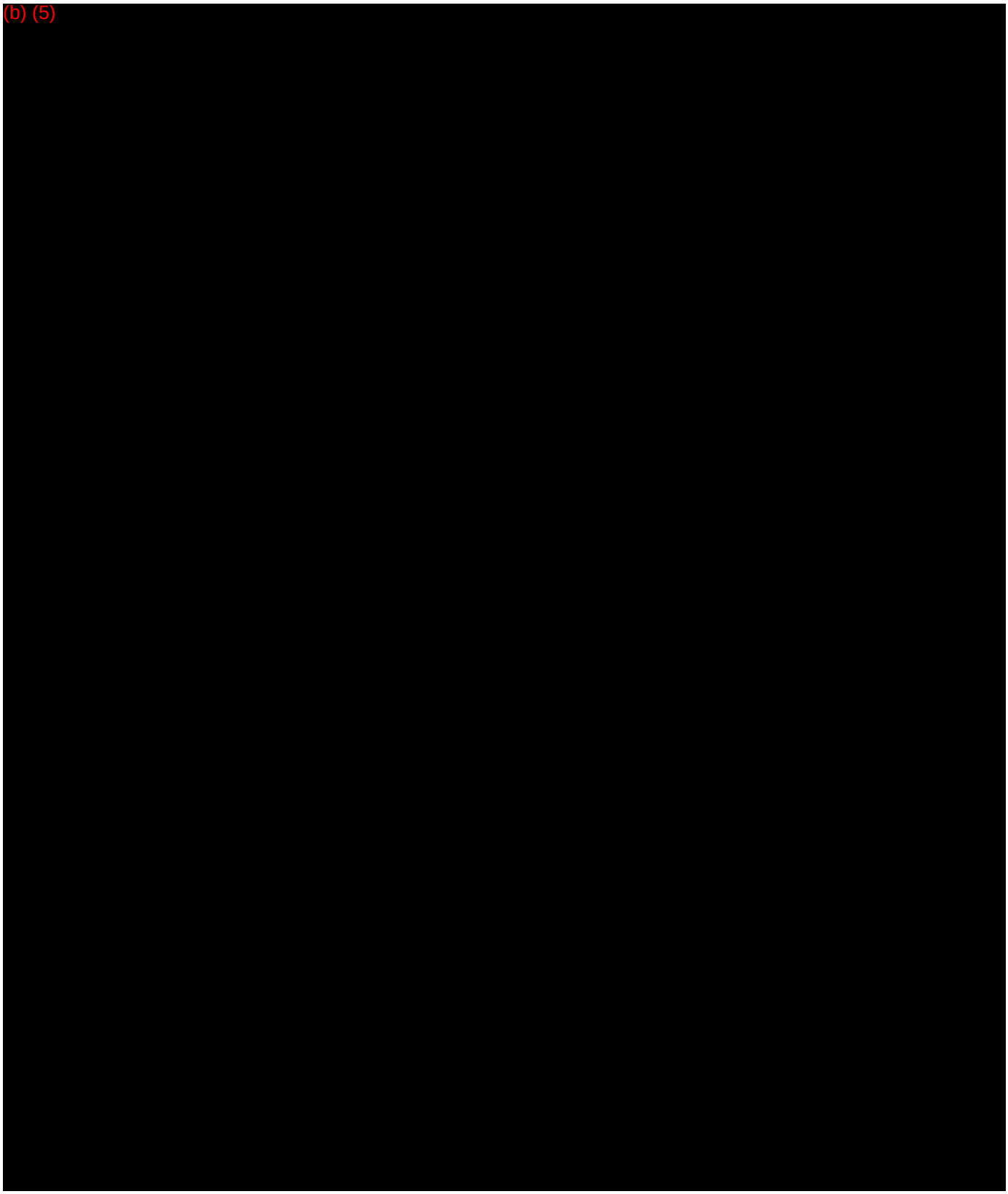

From:	Daniel Jorjani
To:	David Bernhardt; todd_willens@ios.doi.gov
Subject:	Fwd: Draft Ethics Guidance on CVP and SWP - 2019 BA and Draft NOI EIS
Date:	Friday, February 15, 2019 7:10:00 PM
Attachments:	DEO CVP and SWP Analysis (Updated Draft for Review 2-15-19).docx

---

AWP
ACP
Confidential Draft Document

Current draft -

Sent from my iPhone

Begin forwarded message:

> **From:** "Gottry, Heather" <heather.gottry@sol.doi.gov>
> **Date:** February 15, 2019 at 6:21:41 PM EST
> **To:** Daniel Jorjani <daniel.jorjani@sol.doi.gov>
> **Cc:** Scott De La Vega <scott.delavega@sol.doi.gov>, Edward McDonnell <edward.mcdonnell@sol.doi.gov>
> **Subject: Draft Ethics Guidance on CVP and SWP - 2019 BA and Draft NOI EIS**
>
> Dan - Attached for your reference is the current version of our draft memo analyzing whether the Draft EIS NOI for the Coordinated LTO of the CVP and SWP and the Reinitiation of Consultation on the Coordinated LTO of the CVP and SWP - Biological Assessment are matters, particular matters of general applicability, or particular matters involving specific parties under the ethics laws and regulations.
>
> We discussed this with David in our meeting this morning and he asked to review the current draft version. The attached memo has also been reviewed by Carter and Peg and we incorporated their minor technical edits. Please do not hesitate to let us know if you have any edits, comments or questions, or if it would be helpful to schedule a time to discuss further. Thank you.
>
> - Heather
>
> --
>
> Heather Gottry
>
> Deputy Director, Program Management & Compliance
>
> Departmental Ethics Office | Office of the Solicitor
>
> U.S. Department of the Interior | MIB 5317

(O) (202) 208-4472

(C) (202) 740-0417

heather.gottry@sol.doi.gov

Visit us online at: www.doi.gov/ethics

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Pre-Decisional Draft for Discussion Only

MEMORANDUM

TO: Scott A. de la Vega, Director, Departmental Ethics Office & Designated Agency Ethics Official

FROM: Heather C. Gottry, Deputy Director for Program Management and Compliance, Departmental Ethics Office & Alternate Designated Agency Ethics Official

Edward McDonnell, Deputy Director for Ethics Law and Policy, Departmental Ethics Office

DATE: February __, 2019

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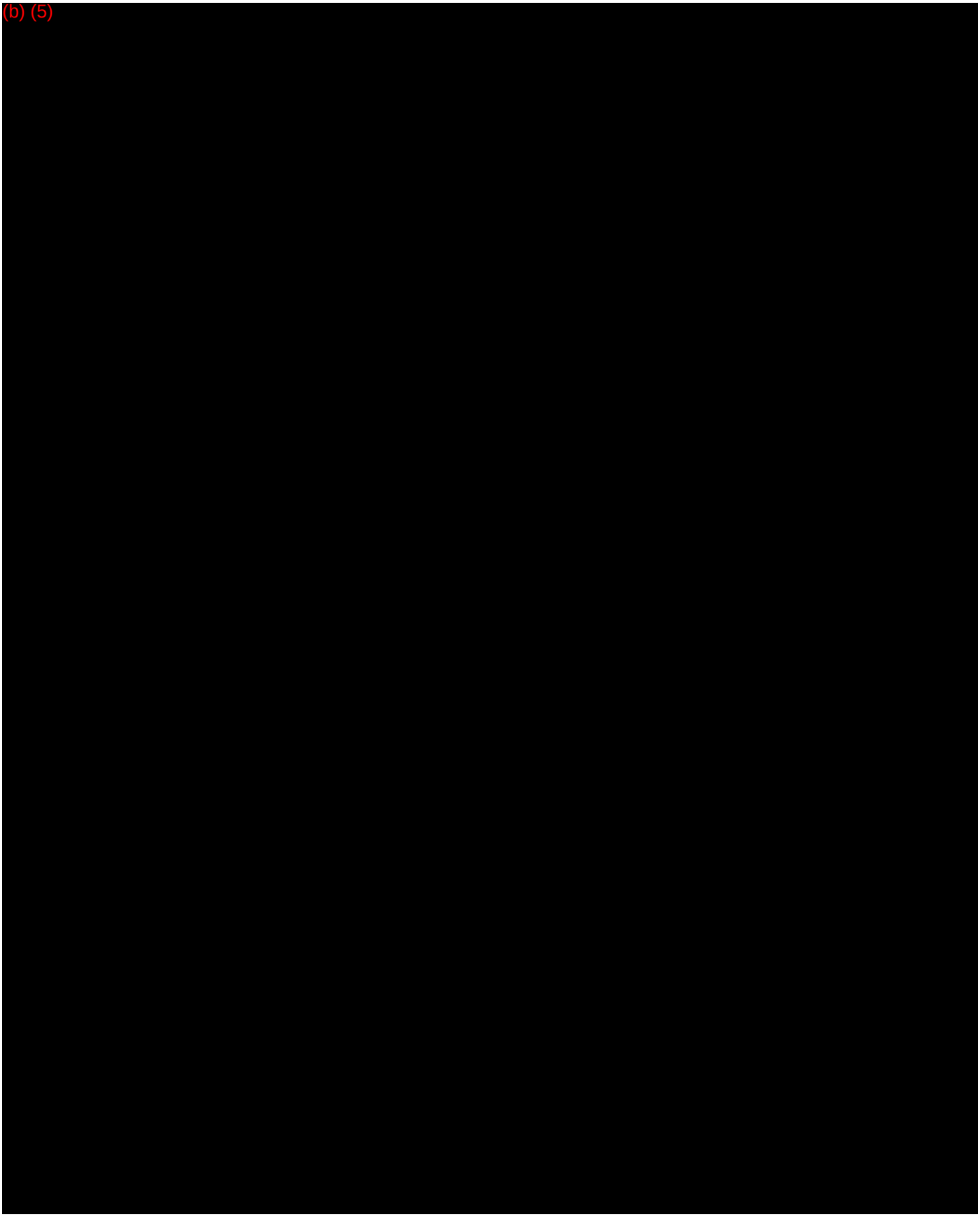

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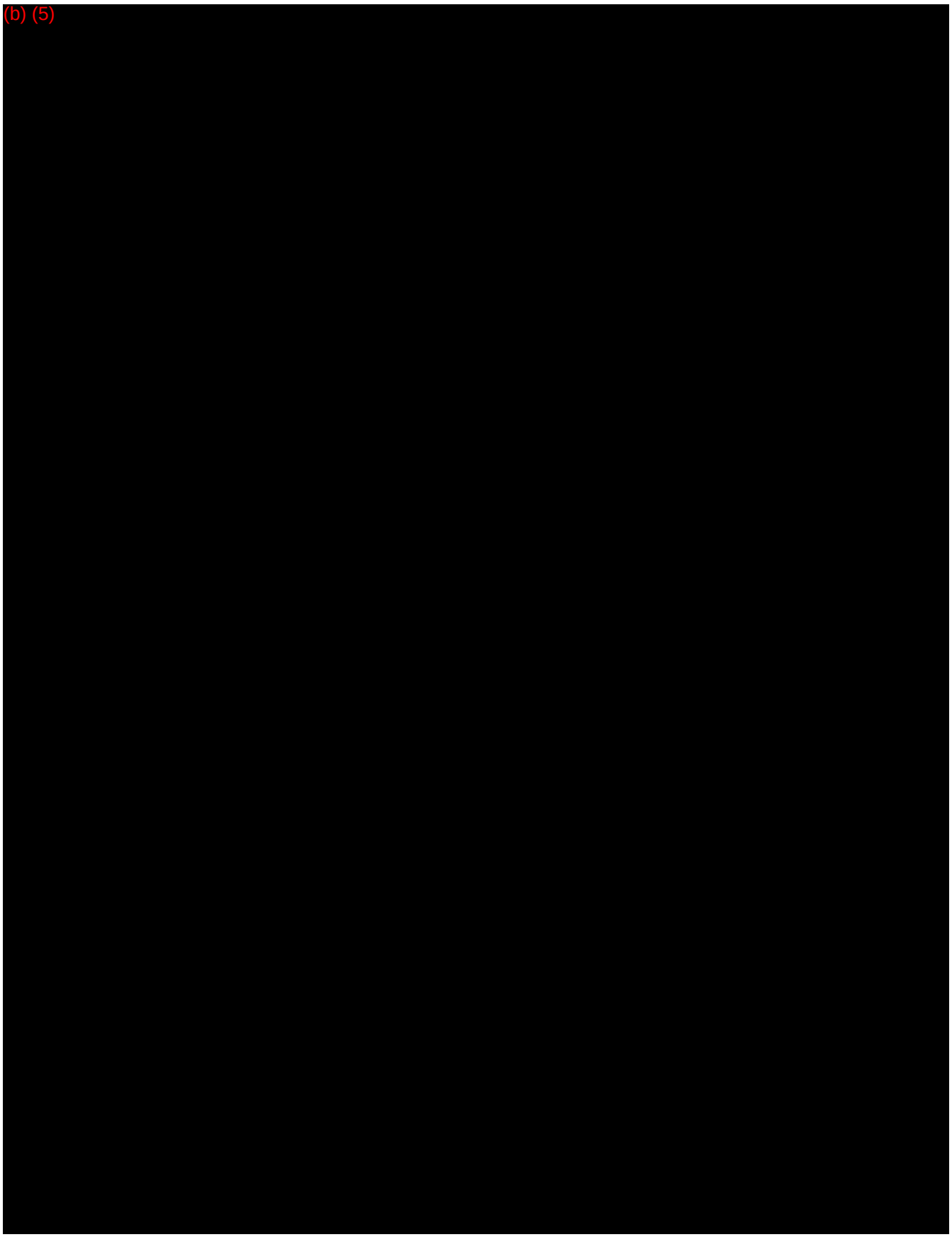

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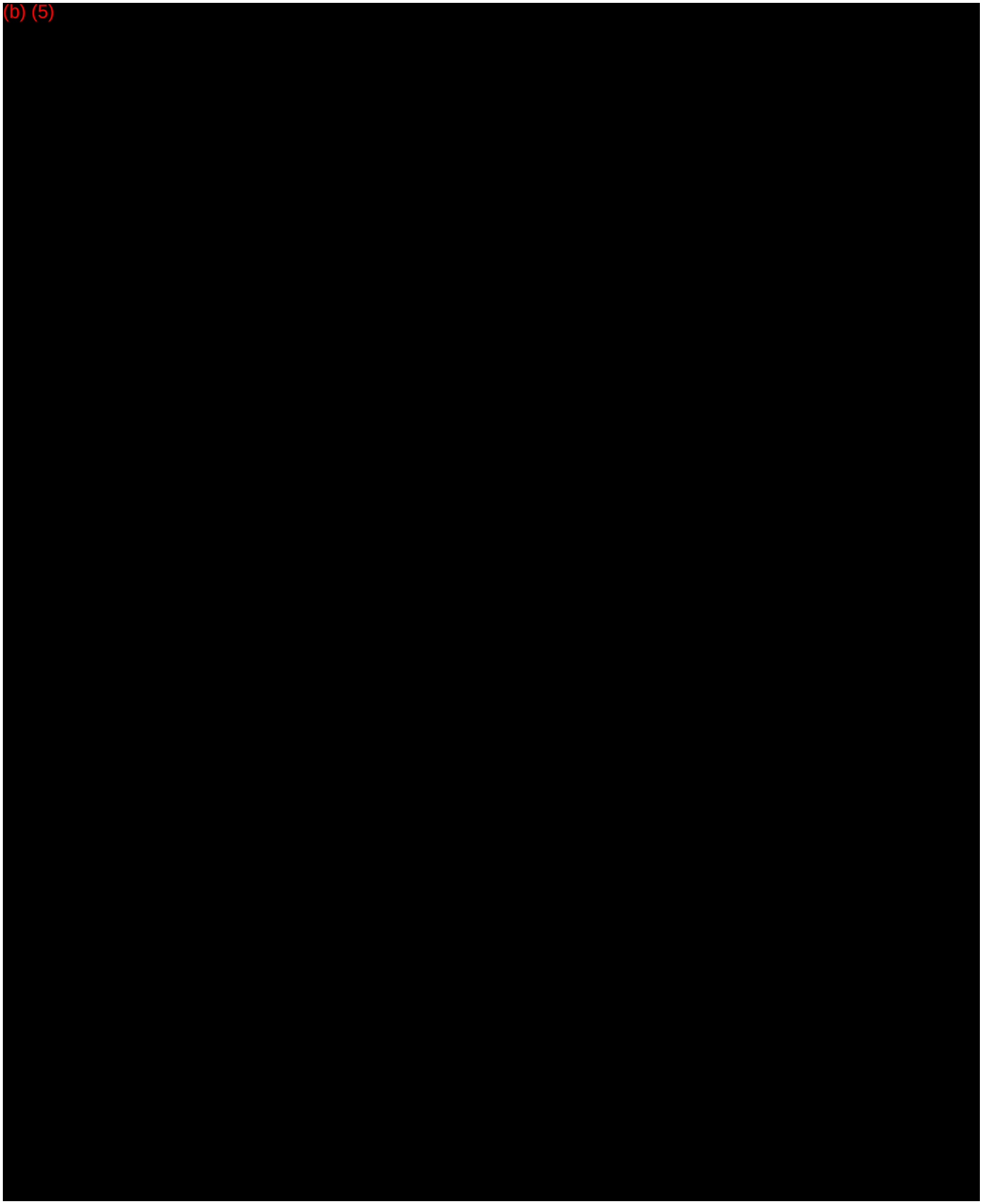

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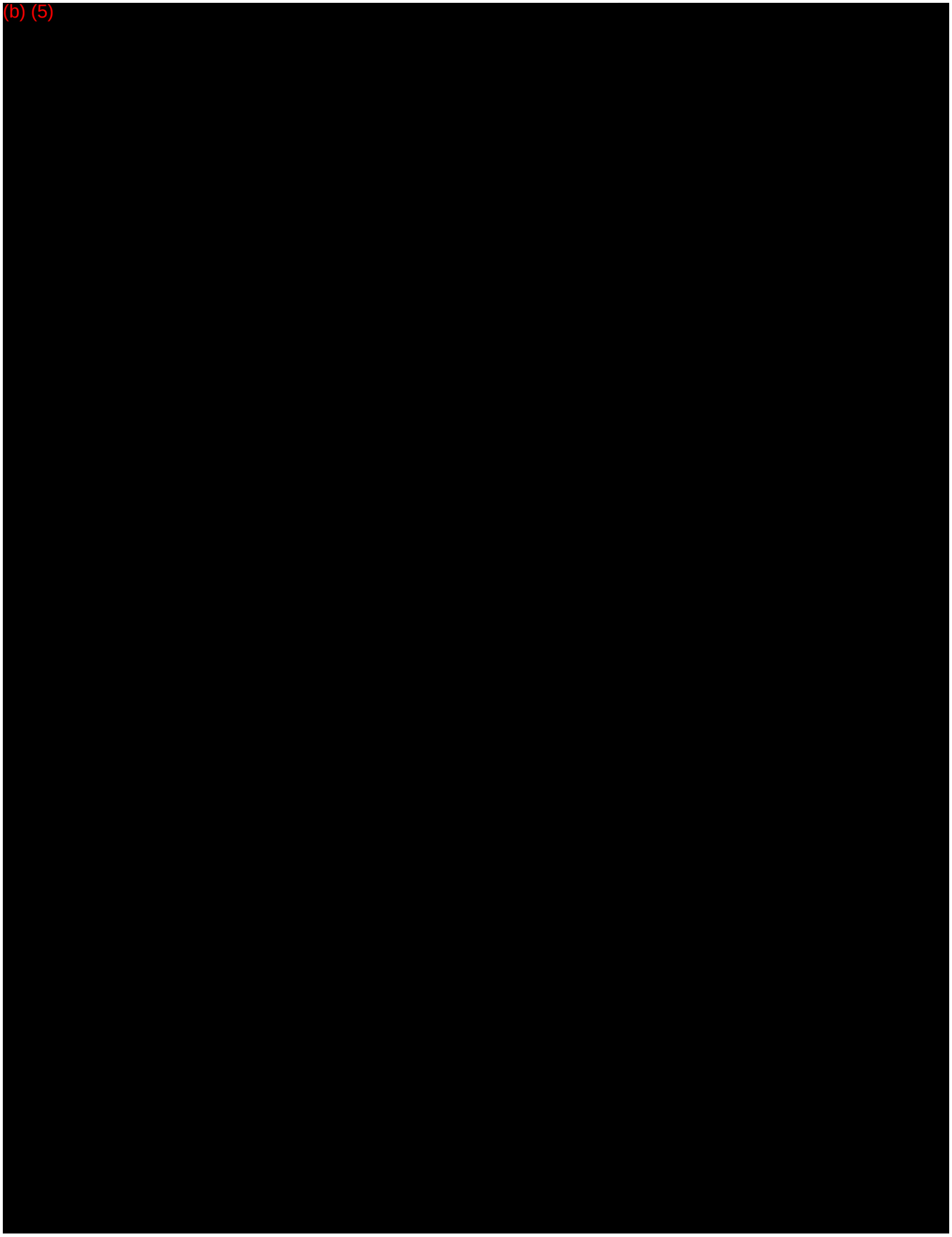

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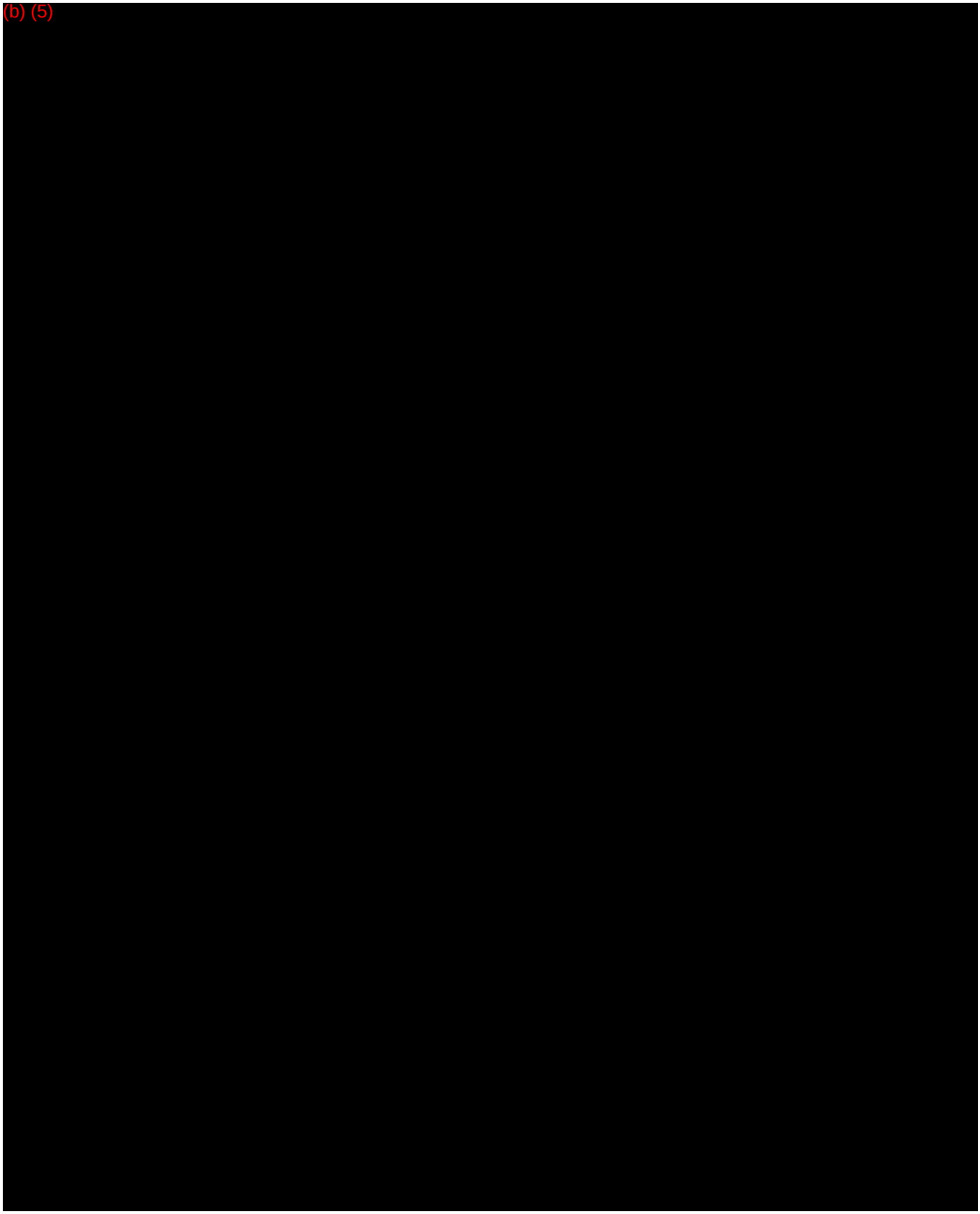

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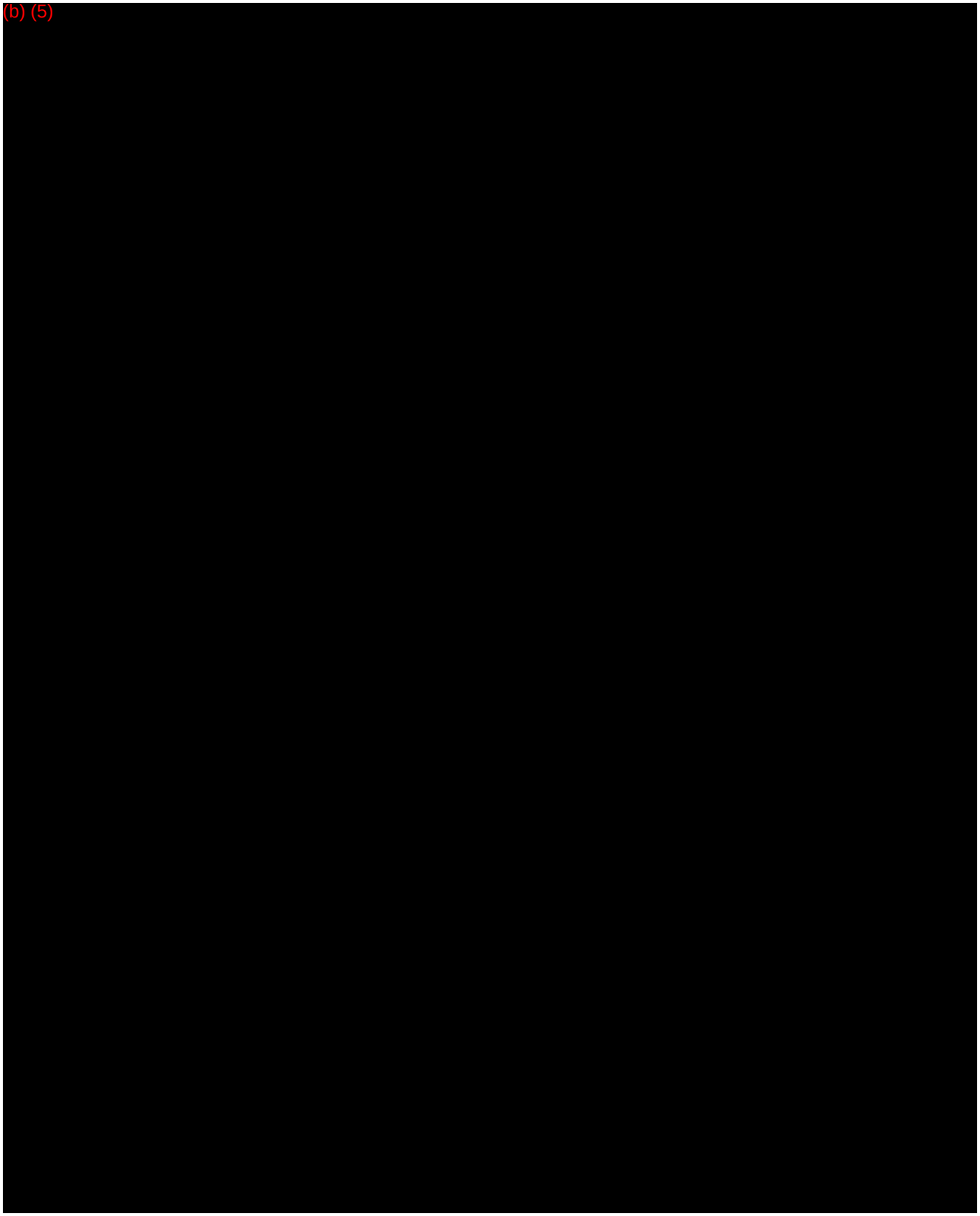

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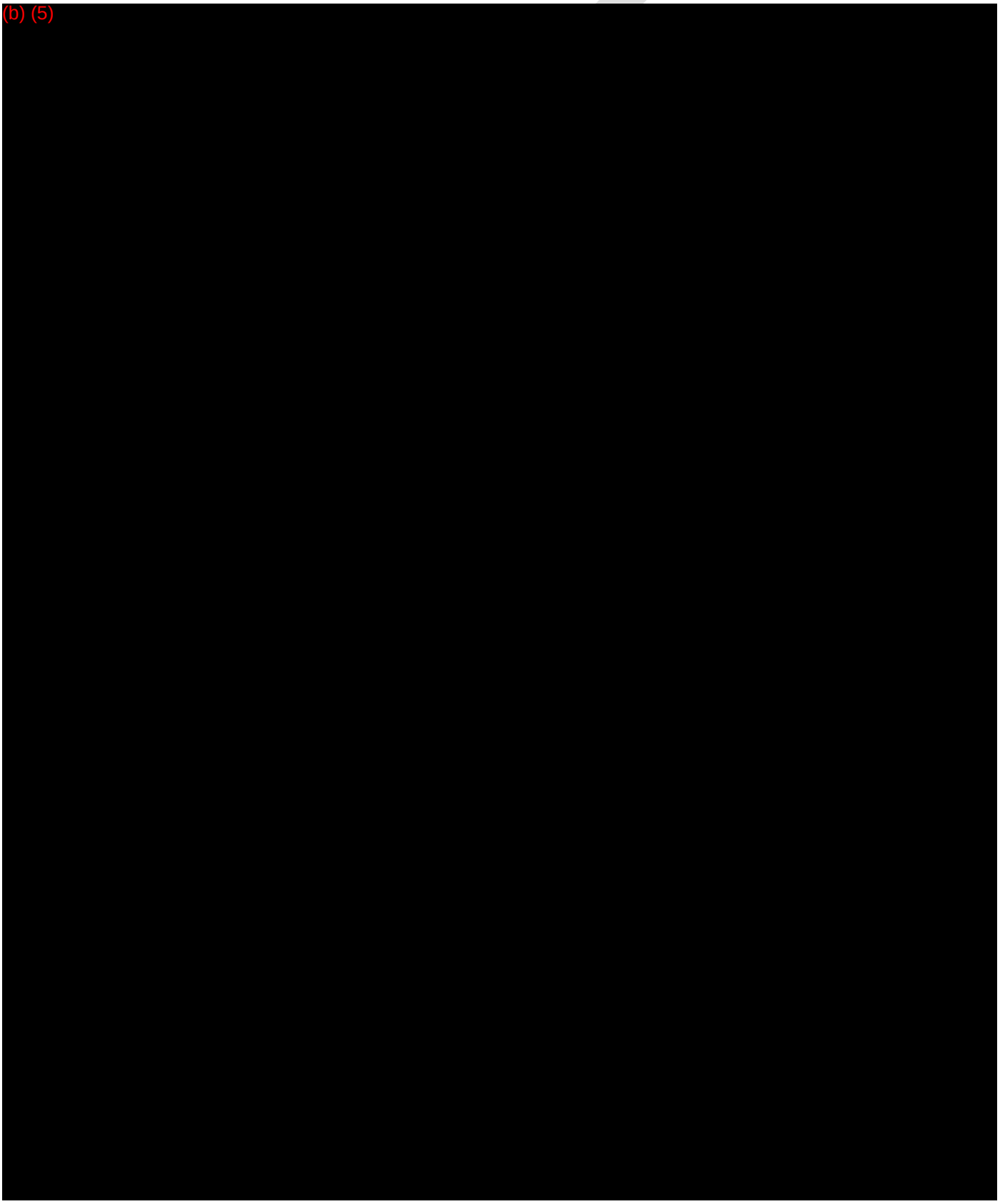

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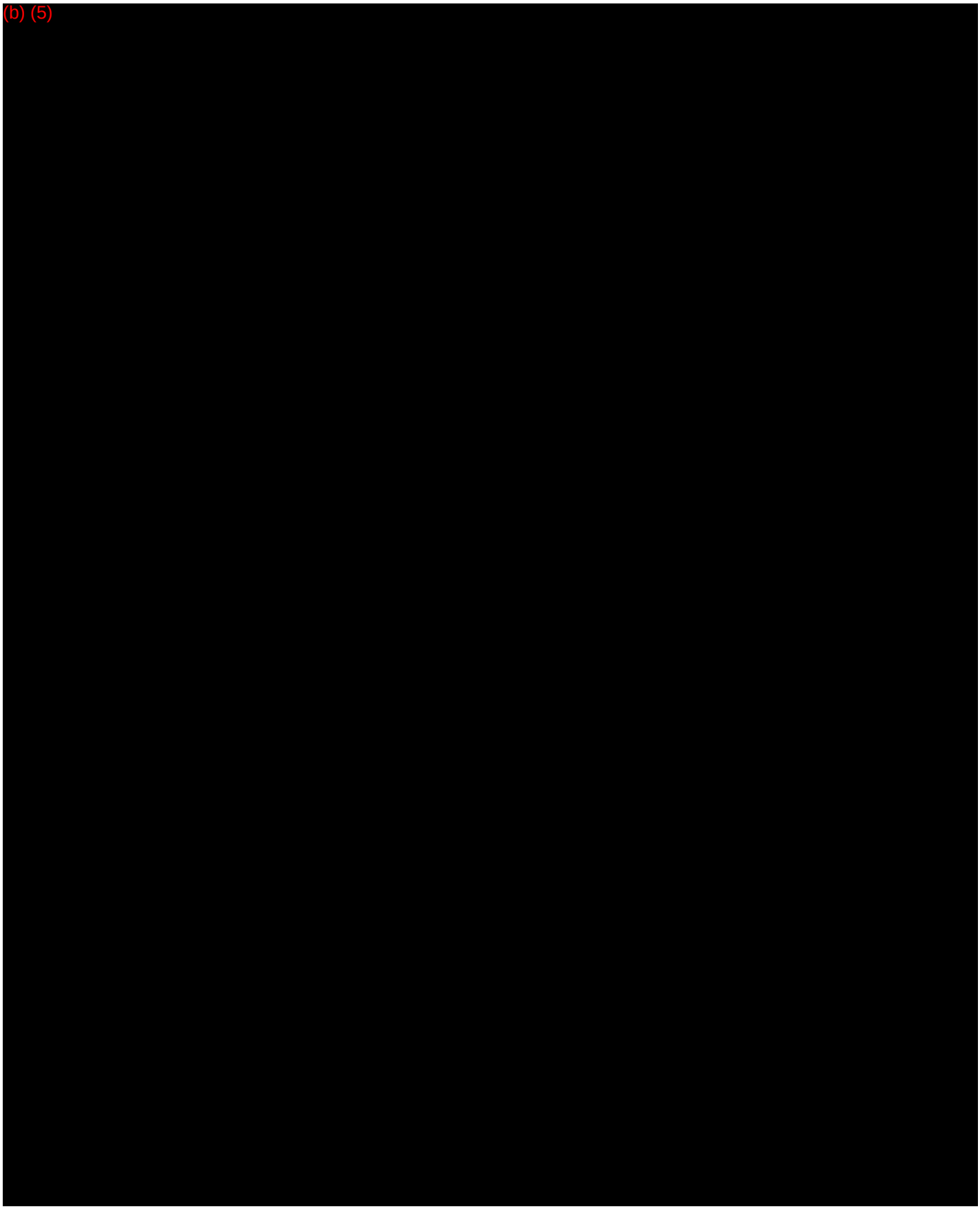

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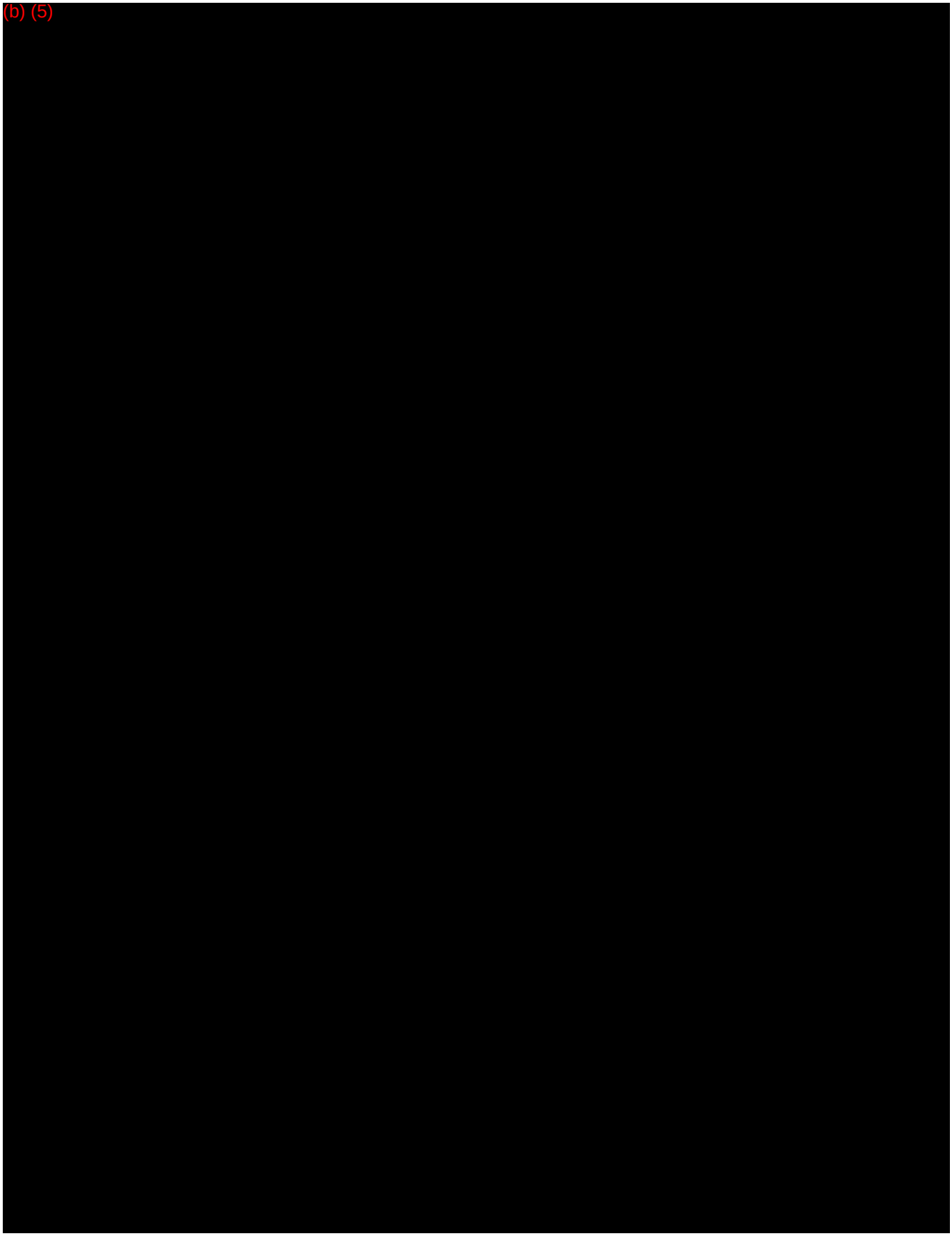

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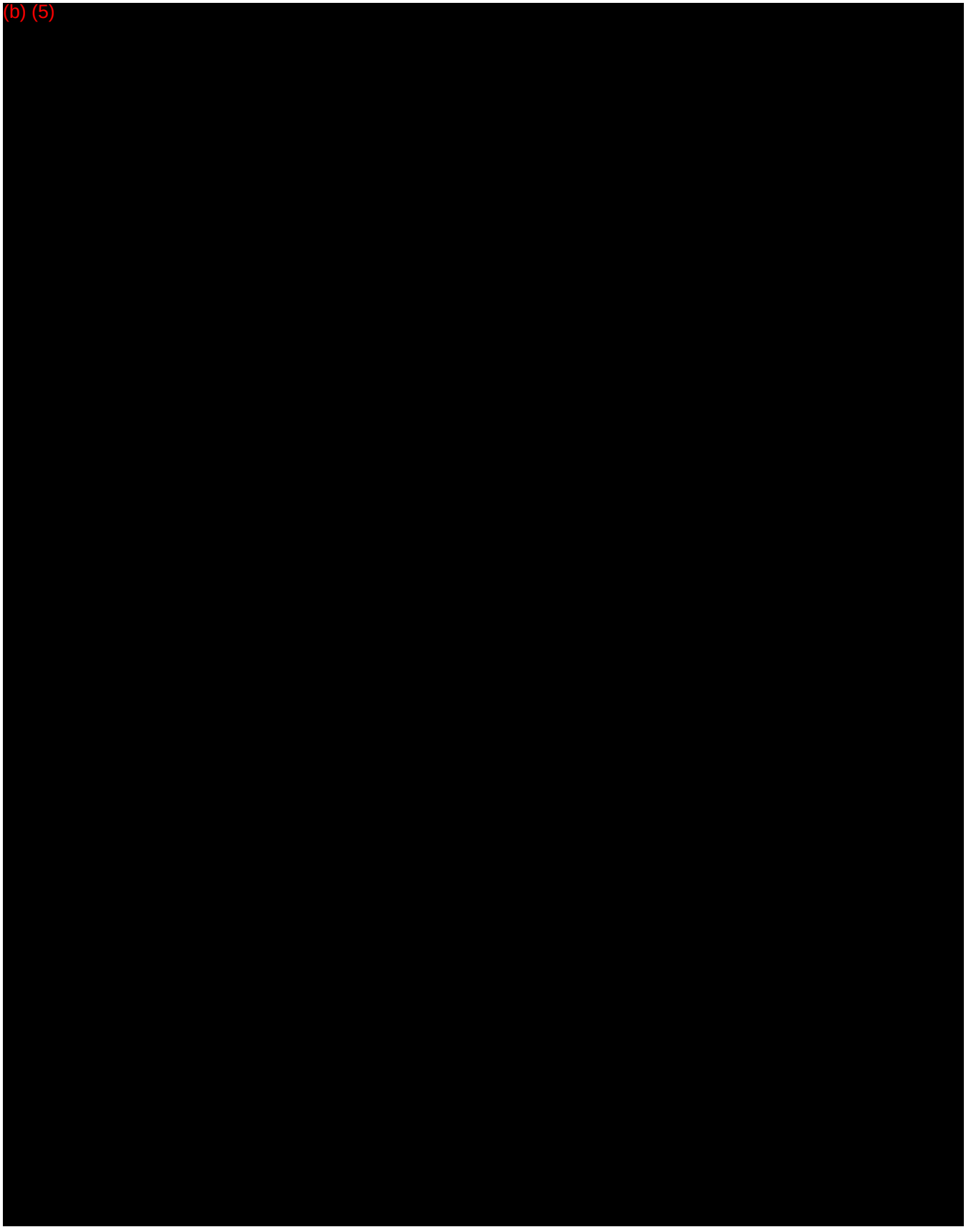

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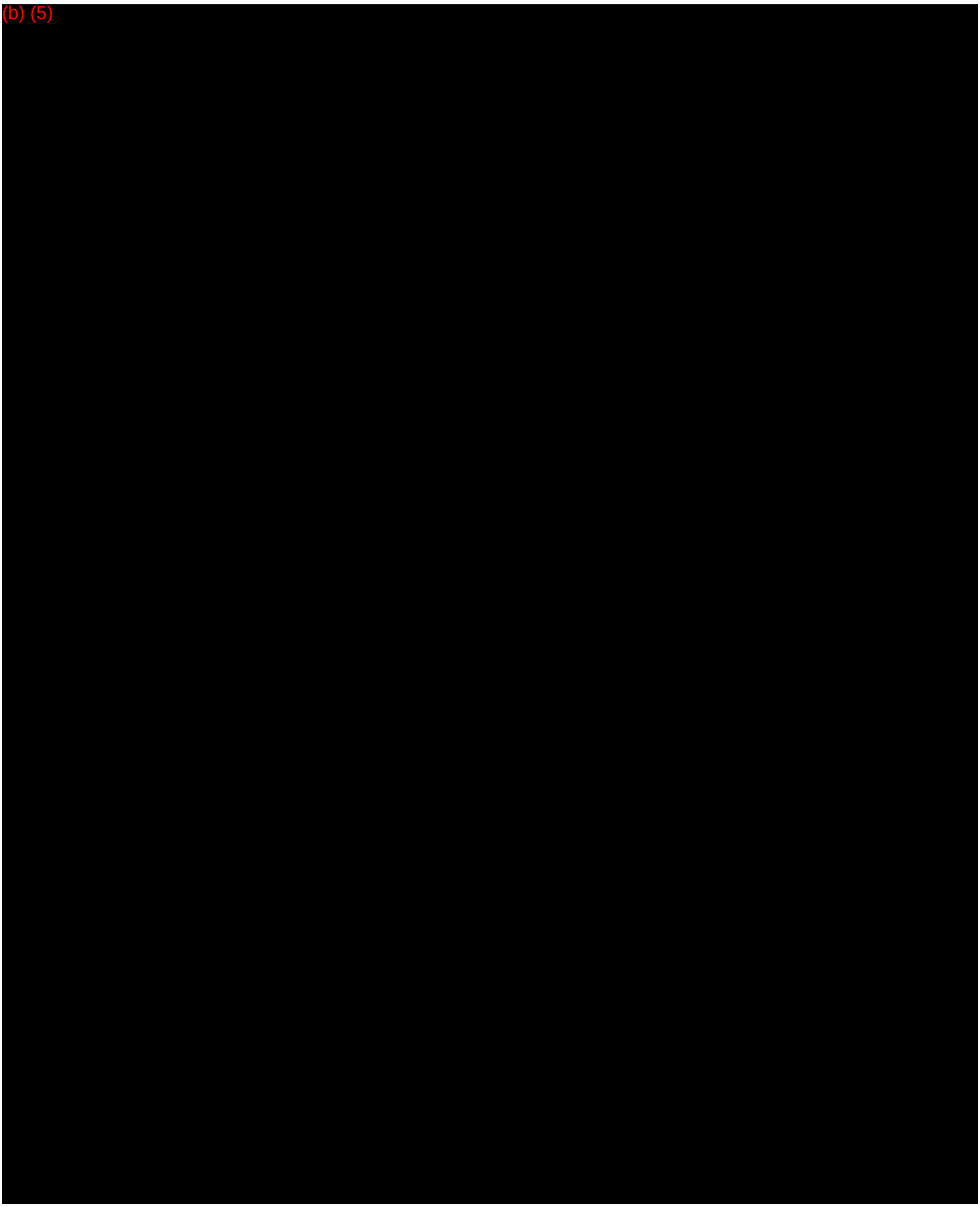

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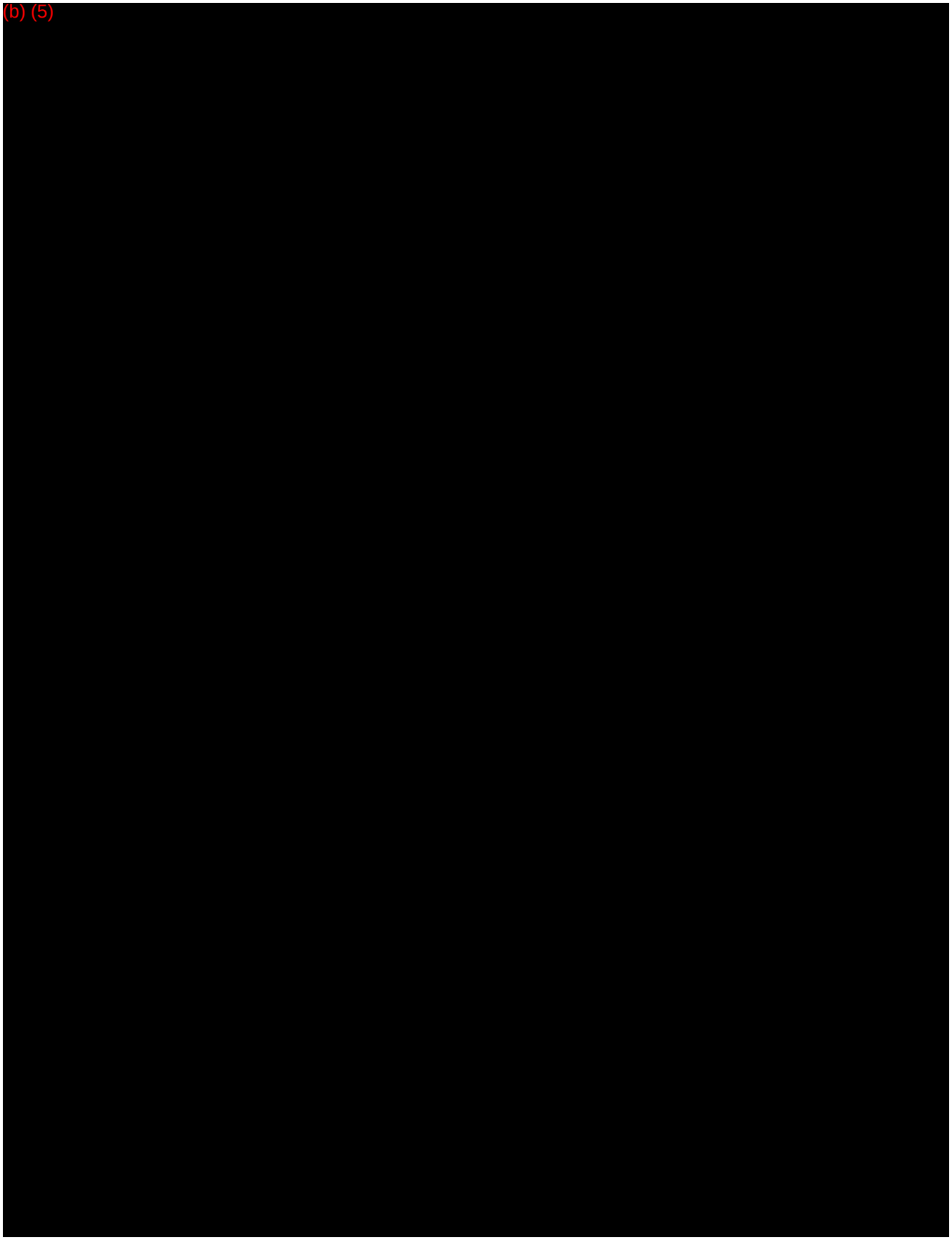

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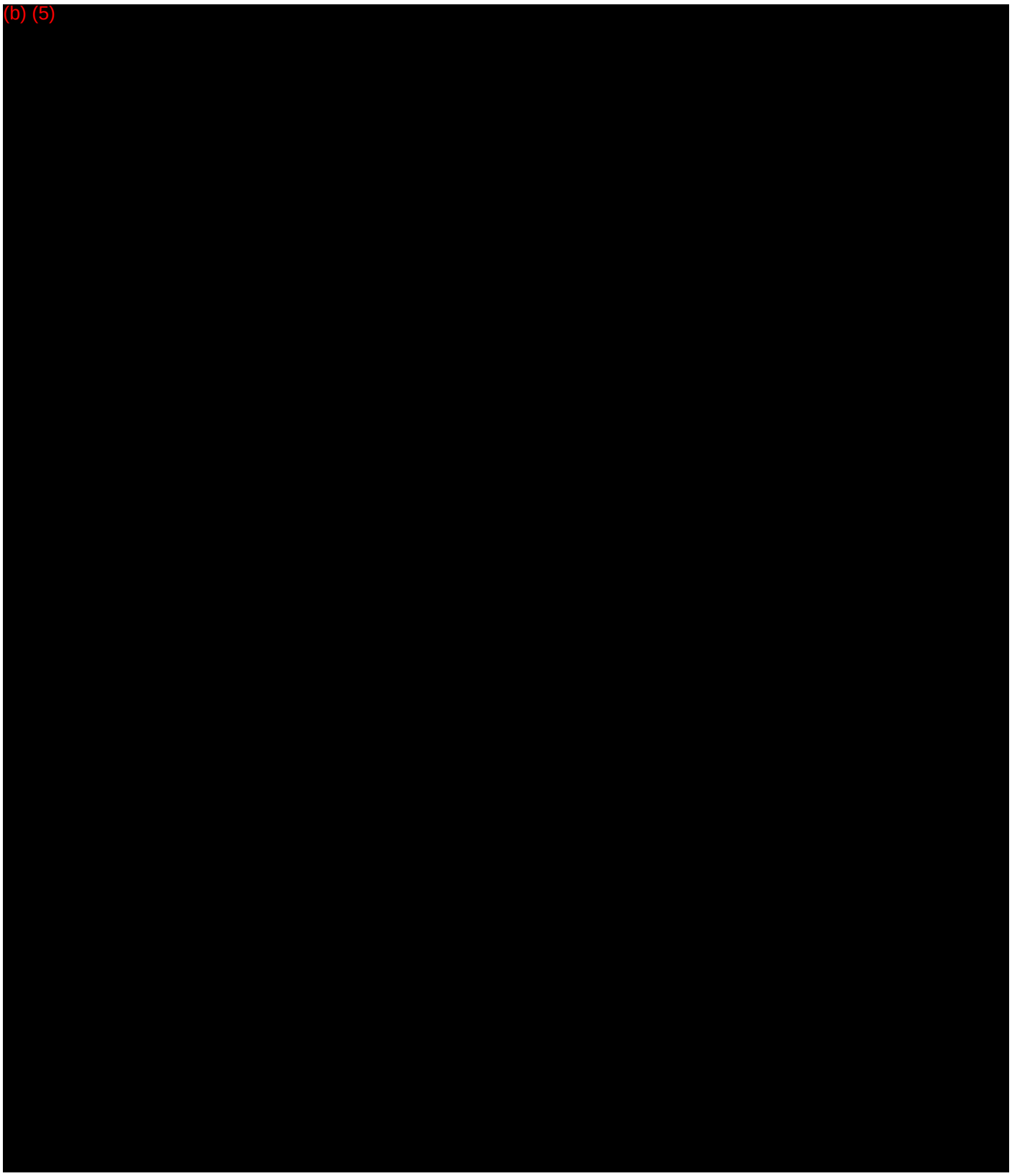

From: de la Vega, Scott
To: David Bernhardt
Cc: Daniel Jorjani; Heather Gottry; McDonnell, Edward
Subject: Legal Categorization of CVP/SWP Issues
Date: Tuesday, February 19, 2019 8:04:02 PM
Attachments: Legal Categorization Memo CVP 2.19.19.pdf
LA-17-03.pdf
Copy of LA-17-03 Webinar.pdf
DO-09-011.pdf
LA 05x01.pdf
do-06-02_9.pdf

Acting Secretary Bernhardt:

Recently, you requested that my office examine prior ethics advice and counsel you had received from the Departmental Ethics Office (DEO) in regards to issues, decisions, and/or actions pending at the DOI involving the Central Valley Project (CVP) and the State Water Project (SWP) in California. You have also asked for my recommendations on any additional best practices to implement to fully ensure that you are in compliance with your Ethics Agreement, Executive Order 13770 (the "Ethics Pledge"), and all other ethics laws and regulations.

Attached, please find a detailed memorandum wherein the DEO reviews and explains the prior guidance you have received from this office and, of utmost importance, categorizes CVP and SWP issues as "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties." These legal categorizations are critical in determining whether an official complies with the various ethics rules. Reports that conflate these categories are sometimes confusing, however, the legal analysis and conclusion that Public Law 114-322 is not a "particular matter" and that both the Notice of Intent to Prepare a Draft EIS and the development of a 2019 Biological Assessment are "matters," not "particular matters" are supported by Federal law and Office of Government Ethics opinions. Consequently, these broad matters are outside the scope of paragraph 7 of the Ethics Pledge despite colloquially sounding like a "specific issue area."

Going forward, you and your staff should continue to consult with my office in advance of your participation in any matter that is potentially within the scope of your Ethics Agreement, the Ethics Pledge, or any other ethics laws or regulations. In addition, to eliminate any potential for miscommunication, misunderstanding or error, I have instructed my staff that all guidance to you be in writing before you decide to participate in a decision or action that reasonably appears to come within the purview of your legal ethics obligations. The implementation of these two recommendations will facilitate addressing any future question raised by your participation in a "matter," "particular matter of general applicability," or a "particular matter involving specific parties."

Finally, I am attaching reference materials that highlight many of the concepts discussed in the memorandum. Please let me know if you have any questions or would like to discuss any of these issues further and thank you for your conscientious approach to ethics compliance.

Scott A. de la Vega

Director, Departmental Ethics Office

& Designated Agency Ethics Official

Office of the Solicitor

U.S. Department of the Interior | MIB 5309

(O) (202) 208-3038

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scott.delavega@sol.doi.gov

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United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

MEMORANDUM

TO: Scott A. de la Vega, Director, Departmental Ethics Office & Designated Agency Ethics Official

FROM: Heather C. Gottry, Deputy Director for Program Management and Compliance, Departmental Ethics Office & Alternate Designated Agency Ethics Official

Edward McDonnell, Deputy Director for Ethics Law and Policy, Departmental Ethics Office

DATE: February 19, 2019

RE: Ethics Guidance on How to Categorize Issues, Decisions, and/or Actions Pending at DOI and Involving the Central Valley Project and State Water Project as "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties"

This memorandum consolidates and memorializes prior ethics advice and guidance provided by the Department Ethics Office (DEO) about whether issues, decisions, and/or actions pending at the U.S. Department of the Interior (DOI) involving the Central Valley Project (CVP), and coordination of operations with the State Water Project (SWP) should be categorized as "matters," "particular matters of general applicability," or "particular matters involving specific parties" pursuant to the definitions of those terms in ethics regulations and guidance from the Office of Government Ethics (OGE). 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.201; 5 C.F.R. § 2641.201(h)(1)-(2); OGE DO-06-029, *"Particular Matter Involving Specific Parties," "Particular Matter," and "Matter"* (Oct. 4, 2006) (OGE DO-06-029). As a general matter, while it is clear that there are many broad policy determinations impacting the entire CVP and/or SWP that would not constitute either "particular matters of general applicability" or "particular matters involving specific parties," case-by-case factual analysis and ethics review will be required in most circumstances in order to determine whether an issue, decision, or action involving the CVP and/or SWP and pending before the DOI should be categorized as a "matter," "particular matter of general applicability," or "particular matter involving specific parties". This categorization will in turn govern whether certain DOI employees may participate in the issue, decision, or action involving the CVP and/or SWP and pending before the DOI, or whether they are required to disqualify themselves or recuse from participation pursuant to 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the requirements of paragraphs 6 and 7 of Executive Order 13770

entitled, "Ethics Commitments by Executive Branch Appointees" (Jan. 28, 2017) (Ethics Pledge).

This memorandum first provides background information on the CVP and the SWP. Second, the memorandum provides a summary of the applicable and governing legal definitions of "matters," "particular matters of general applicability", or "particular matters involving specific parties" found in the ethics regulations and other OGE guidance. Third, this memorandum applies these definitions to the deliberations and discussions that resulted in the publication of a *Notice of Intent to Prepare a Draft Environmental Impact Statement, Revisions to the Coordinated Long-Term Operation (LTO) of the CVP and the SWP, and Related Facilities* (*Draft EIS NOI*) in the Federal Register on December 29, 2017, or the DOI process that resulted in the *Reinitiation of Consultation on the Coordinated LTO of the CVP and SWP, Final Biological Assessment* (*2019 BA*), dated January 2019, in order to determine whether they should be categorized as "matters," "particular matters of general applicability," or "particular matters involving specific parties" as defined in the ethics regulations. Finally, this memorandum provides general guidance on how the DEO categorizes issues, decisions, and/or actions involving the CVP and/or SWP pending before the DOI as "matters," "particular matters of general applicability," or "particular matters involving specific parties."

I. Background of the CVP and SWP

As set forth in *2019 BA*, Congress authorized the U.S. Bureau of Reclamation (Reclamation)[1] to develop the CVP for the public good of delivering water and generating power, while providing flood protection to downstream communities and protecting water quality for water users within the system.[2] *2019 BA* at 1.1.1., 1-3. In its authorization to Reclamation, Congress envisioned that the CVP would be composed of a large, complex project integrated across multiple watersheds that Reclamation would operate to ensure the most beneficial use of water released into the system. *Id.*

---

[1] Reclamation's mission is to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public. *2019 BA* at 1-1. Reclamation is the largest wholesale water supplier in the United States, and the nation's second largest producer of hydroelectric power. *Id.* Its facilities also provide substantial flood control, recreation, and fish and wildlife benefits. *Id.* In California, Reclamation operates the CVP in coordination with the State of California Department of Water Resources' (DWR) operation of the SWP. *Id.* The mission of the DWR is to manage the water resources of the State of California, in cooperation with other agencies, to benefit the state's people and to protect, restore, and enhance the natural and human environment. *Id.*

[2] The Rivers and Harbors Act of 1935 authorized Reclamation to take over the CVP from the State of California and its initial features were authorized for construction. In 1992, Public Law 102-575 included Title 34, the Central Valley Project Improvement Act (CVPIA) that refined water management for the CVP. *2019 BA* at 1.1.1, 1-4. The CVPIA added fish and wildlife mitigation, protection, and restoration as a project purpose with the same priority as water supply, and also added fish and wildlife enhancement as a project purpose with the same priority as power generation. *Id.* In addition, the CVPIA prescribed a number of actions to improve conditions for anadromous fish and provided for other fish and wildlife benefits. The Secretary of the Interior assigned the primary responsibility for carrying out the many provisions of CVPIA to Reclamation and the U.S. Fish and Wildlife Service (USFWS).

Currently, Reclamation operates the CVP consistent with the CVP's federally authorized purposes, which include: river regulation; improvement of navigation; flood control; water supply for irrigation and municipal and industrial uses; fish and wildlife mitigation, protection, and restoration; power generation; and fish and wildlife enhancement. *Id.* at 1.1.1, 1-4. The CVP consists of 20 dams and reservoirs that together can store nearly 12 million acre-feet (MAF) of water. *Id.* at 1-1. Reclamation holds over 270 contracts and agreements for water supplies that depend upon CVP operations. *Id.* Through operation of the CVP, Reclamation delivers water in 29 of California's 58 counties. *Id.* The CVP serves farms; homes, and industry in California's Central Valley as well as the major urban centers in the San Francisco Bay Area; it is also the primary source of water for much of California's wetlands. In addition to delivering water for farms, homes, factories, and the environment, the CVP produces electric power and provides flood protection, navigation, recreation, and water quality benefits. While the CVP's facilities are spread out over hundreds of miles, the CVP is financially and operationally integrated by the DOI as a single large water project.

The SWP is a water storage and delivery system of reservoirs, aqueducts, powerplants, and pumping plants operated by the State of California.[3] *2019 BA* at 1-1. Its main purpose is to store and distribute water to 29 urban and agricultural water suppliers in Northern California, the San Francisco Bay Area, the San Joaquin Valley, the Central Coast, and Southern California. Of the contracted water supply, 70 percent goes to urban users and 30 percent goes to agricultural users.

In 1986, Congress directed the Secretary of the Interior to execute the Coordinated Operations Agreement (COA) between the CVP and SWP. *2019 BA* at 1.1.1, 1-4. The COA between the U.S. Government and the State of California was signed by DWR and Reclamation in 1986. The COA defined CVP and SWP facilities and their water supplies, coordinated operational procedures between the DOI and the State of California, identified formulas for sharing joint responsibility between the DOI and the State of California for meeting Delta standards (such as those in D-1485), identified how unstored flow is shared between the CVP and SWP, and established a framework for exchange of water and services between the projects between the CVP and SWP. *Id.* In 1999, the California State Water Resources Control Board issued D-1641, obligating the CVP and SWP to the 1995 Bay-Delta Water Quality Control Plan. Revised in 2000, D-1641 provided standards for fish and wildlife protection, municipal and industrial water quality, agricultural water quality, and Suisun Marsh salinity. *Id.*

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[3] The Burns-Porter Act, approved by the California voters in November 1960 (Water Code [Wat. Code] §§ 12930–12944), authorized issuance of bonds for construction of the SWP. DWR's authority to construct state water facilities or projects is derived from the Central Valley Project Act (CVPA) (Wat. Code § 11100 et seq.), the Burns-Porter Act (California Water Resources Development Bond Act) (Wat. Code §§ 12930–12944), the State Contract Act (Pub. Contract Code § 10100 et seq.), the Davis-Dolwig Act (Wat. Code §§ 11900–11925), and special acts of the State Legislature. *2019 BA* at 1.1.1, 1-4. In 1978, the SWRCB issued Water Rights Decision 1485 (D-1485). D-1485 required spring outflow and set salinity standards in the Delta while setting standards for the diversion of flows into the Delta during winter and spring. *Id.*

The complex and varied activities of DOI with respect to the CVP and SWP are governed by a variety of laws, including the Water Infrastructure Improvements for the Nation Act (WIIN Act) (Pub. L. 114–322, 130 Stat. 1628). Section 4001 of the WIIN Act directs the Secretary of the Interior and the Secretary of Commerce to provide the maximum quantity of water supplies practicable to CVP contractors and SWP contractors by approving, in accordance with federal and applicable state laws, operations or temporary projects to provide additional water supplies as quickly as possible, based on available information. Consistent with authorizations and directions provided by Congress, the DOI routinely analyzes and takes action on a wide variety of both macro and micro operational and programmatic issues, decisions, and/or actions involving the operation of the CVP and coordination with the SWP.

II. Applicable Legal Definitions of "Matters," "Particular Matters of General Applicability," and "Particular Matters Involving Specific Parties"

For purposes of analyzing under ethics laws, regulations, and rules whether and to what extent a DOI employee is required to recuse from participating in a policy, operational and/or programmatic issue, decision, and/or action involving the operation of the CVP and coordination with the SWP depends on whether it is categorized as a matter, particular matter of general applicability, or particular matter involving specific parties. These are terms of art with established meanings defined in ethics laws and regulations as well as guidance from the OGE. 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.201; 5 C.F.R. § 2641.201(h)(1)-(2); OGE DO-06-029, *"Particular Matter Involving Specific Parties," "Particular Matter," and "Matter"* (Oct. 4, 2006).

A. Definition of "Matter"

In the context of the ethics statutes and regulations, the unmodified term "matter" can refer to virtually all Government work from the broadest to the most narrow issue, decision, and/or action. OGE DO-06-029 at 10-11. The broad definition of "matter" also includes any "particular matter", including "particular matters of general applicability" or "particular matters involving specific parties." *Id* at 11. However, if an issue, decision, and/or action pending at the DOI can be categorized as a "particular matter of general applicability" or a "particular matter involving specific parties" then there are specific recusal and disqualification requirements that will apply to a DOI employee's participation in the issue, decision, and/or action in question. Such recusal and disqualification requirements may arise if a DOI employee has a financial interest that could be directly and predictably effected by the issue, decision, and/or action, if the DOI employee has a "covered relationship" (such as former employer, former client, spousal employer, *etc.*) with one of the parties involved in the issue, decision, and/or action, or if the DOI employee lobbied on the same particular matter prior to employment with the DOI. These recusal and disqualification requirements will generally not apply if the issue, decision, and/or action is not categorized as either a "particular matter of general applicability" or a "particular matter involving specific parties."

While the term "matter" is not affirmatively defined in the ethics regulations, for purposes of determining whether the specific recusal and disqualification requirements which apply to "particular matters of general applicability" or "particular matters involving specific

parties" are applicable to an issue, decision, and/or action pending at the DOI, a working definition can be derived from examples in the ethics regulations of the types of issues, decisions, and/or actions that OGE does not consider to be "particular matters of general applicability" or "particular matters involving specific parties." 5 C.F.R. § 2635.402(b)(3)(Ex. 1)(regulations changing the manner in which depreciation is calculated is not a particular matter, nor is the Social Security Administration's consideration of changes to its appeal procedures for disability claimants); 5 C.F.R. § 2641.201(h)(2)(Ex. 3)(formulation of policies for a nationwide grant program for science education programs targeting elementary school children is not a particular matter).

Therefore, we apply the generally accepted definition that the consideration of broad policy options that are directed to the interests of a large and diverse group of persons, such as health and safety regulations applicable to all employers or a legislative proposal for tax reform would not qualify as either "particular matters of general applicability" or "particular matters involving specific parties." 5 C.F.R. § 2635.402(b)(3). Hereinafter, for purposes of the analysis and discussion in this memorandum, the term "matter" is used to describe the consideration of broad policy options that are directed to the interests of a large and diverse group of persons.

Therefore, if an issue, decision, and/or action pending at the DOI is (1) broad and (2) directed to the interests of a large and diverse group of persons, then the recusal and disqualification requirements found in ethics laws, regulations, and rules for "particular matters of general applicability" and "particular matters involving specific parties" would not apply, and a DOI employee will generally be able to fully participate in the issue, decision, and/or action. [4]

B. Definition of "Particular Matter"

The term "particular matter" means any matter that involves "deliberation, decision, or action that is focused on the interests of specific persons or a discrete and identifiable class of persons." 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.103(a)(1).[5] The term "particular matter", however, "does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons." 5 C.F.R. § 2635.402(b)(3). Based on this definition it is clear that "particular matters" may include matters that do not involve specific parties and are not "limited to adversarial proceedings or formal legal relationships." Van Ee v. EPA, 202 F.3d 296, 302 (D.C. Cir. 2000) (Van Ee).[6]

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[4] The term "matter" is found in the one-year post-employment restrictions in 18 U.S.C. § 207(c) and (d) for "senior employees" and "very senior employees." Therefore, those restrictions will be applicable even to issues, decisions, and/or actions at the DOI that are (1) broad and (2) directed to the interests of a large and diverse group of persons. 5 C.F.R. § 2635.402(b)(3).

[5] Please note that for purposes of the Ethics Pledge, the term "particular matter" has the same meaning as set forth in 18 U.S.C. § 208, and 5 C.F.R. § 2635.402(b)(3). Ethics Pledge, Sec. 2(r).

[6] In Van Ee, the D.C. Circuit construed 18 U.S.C. § 205(a)(2), which bars executive branch employees and others from "act[ing] as agent or attorney" for others "before any department, agency, [or] court" in connection with certain "covered matters" in which "the United States is a party or has a direct and substantial interest." The D.C. Circuit concluded that 18 U.S.C. § 205(a)(2) does not prohibit the communications which the plaintiff in the case, a career employee, proposed to make:

The term "particular matter" generally covers two categories of matters: "(1) those that involve specific parties, and (2) those that do not involve specific parties but at least focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession." OGE DO-06-029 at 8. These two types of particular matters are generally referred to as "particular matters involving specific parties" and "particular matters of general applicability," and the definitions of each type of "particular matter" is discussed further below starting with the broader category of "particular matter of general applicability."

1. Definition of "Particular Matter of General Applicability"

A "particular matter of general applicability" is broader than a "particular matter involving specific parties." 5 C.F.R. § 2641.20(h)(2). A "particular matter of general applicability" does not involve specific parties, but is a matter that focuses on the interests of a discrete and identifiable class, such as a particular industry or profession. *See* OGE DO-06-029 at 8. Examples of "particular matters of general applicability" includes rulemaking, legislation, or policy-making, as long as it is narrowly focused on a discrete and identifiable class such as a particular industry or profession. For instance, a "particular matter of general applicability" at the DOI might include a regulation prescribing safety standards for operators of oil rigs in the Gulf of Mexico or a regulation applicable to all those who have grazing permits on DOI public lands. On the other hand, a land use plan covering a large geographic area and affecting a number of industries (*e.g.*, agriculture, grazing, mining, timber, recreation, wind, solar, and/or geothermal power generation, *etc.*) would not generally constitute a "particular matter of general applicability" but, rather, would still fall within the broader definition of "matter," as it constitutes a broad policy directed to the interests of a large and diverse group of persons.

2. Definition of "Particular Matter Involving Specific Parties"

The narrowest type of matter under the ethics laws, regulations, and rules is a "particular matter involving specific parties." Depending on the grammar and structure of the particular statute or regulation, the wording may appear in slightly different forms, but OGE has advised that the meaning remains the same, focusing primarily on the presence of specific parties.[7] OGE

> We hold that § 205 is inapplicable to Van Ee's uncompensated communications on behalf of public interest groups in response to requests by an agency at which he is not employed for public comment on proposed environmental impact statements related to land-use plans; these proceedings lack the particularity required by the statute, will not result in a direct material benefit to the public interest groups, and do not create a real conflict of interest or entail an abuse of position by Van Ee.

Van Ee, 202 F.3d at 298-99. In reaching this conclusion, the D.C. Circuit analyzed the components required in order for an agency issue, action, and/or decision to be categorized as a "particular matter." This analysis is not limited to 18 U.S.C. § 205, but rather it provides guidance on how to categorize agency issues, actions, and/or decisions for other ethics statutes and regulations, including, but not limited to 18 U.S.C. § 203, 18 U.S.C. § 207, 18 U.S.C. § 208, and 5 C.F.R. § 2635.502.

[7] For example, in the post-employment statute, the phrase "particular matter . . . which involved a specific party or parties" is used. 18 U.S.C. § 207(a)(1), (a)(2). Similar language is used in 18 U.S.C. §§ 205(c) and 203(c), which describe the limited restrictions on representational activities applicable to

DO-06-029 at 10-11. As set forth in 5 C.F.R. § 2641.201(h)(1), a particular matter involving specific parties "typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case." Legislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability are not particular matters involving specific parties. 5 C.F.R. § 2641.201(h)(2). The regulations further advise that "[i]nternational agreements, such as treaties and trade agreements, must be evaluated in light of all relevant circumstances to determine whether they should be considered particular matters involving specific parties; relevant considerations include such factors as whether the agreement focuses on a specific property or territory, a specific claim, or addresses a large number of diverse issues or economic interests." *Id.; see also* OGE DO-06-029 at 2-5.

Additionally, in its preamble to the final rule implementing 5 C.F.R. part 2641, the OGE stated that "OGE does not necessarily equate 'Government program' with 'particular matter involving specific parties.' For one thing, some Government programs are not even, in and of themselves, particular matters involving specific parties. For example, a Government program to understand the causes of a particular disease is not, in and of itself, a particular matter involving specific parties, even though the program may involve several grants, contracts or cooperative agreements all designed to support or implement different aspects of the overall program. *See, e.g., OGE Informal Advisory Letter* 80 x 9; 5 C.F.R. § 2637.201(c)(1) (Ex. 4)." *Post-Employment Conflict of Interest Restrictions Action: Final Rule*, 73 Fed. Reg. 36168, 36177 (June 25, 2008).

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special Government employees. In contrast, 18 U.S.C. § 208 generally uses the broader phrase "particular matter" to describe the matters from which employees must recuse themselves because of a financial interest. However, even this statute has one provision, dealing with certain Indian birthright interests, that refers to particular matters involving certain Indian entities as "a specific party or parties." 18 U.S.C. § 208(b)(4); *see OGE Informal Advisory Letter 00 x 12*. OGE has also issued certain regulatory exemptions, under 18 U.S.C. § 208(b)(2), that refer to particular matters involving specific parties. 5 C.F.R. § 2640.202(a), (b). Additionally, the distinction between "particular matters involving specific parties" and broader types of particular matters (*i.e.*, those that have general applicability to an entire class of persons) is crucial to several other regulatory exemptions issued by OGE under 18 U.S.C. § 208(b)(2). 5 C.F.R. §§ 2640.201(c)(2), (d); 2640.202(c); 2640.203(b), (g). OGE has used similar language in various other rules. Most notably, the provisions dealing with impartiality and extraordinary payments in subpart E of the Standards of Ethical Conduct for Employees of the Executive Branch refer to particular matters in which certain persons are specific parties. 5 C.F.R. §§ 2635.502; 2635.503. OGE also uses the phrase to describe a restriction on the compensated speaking, teaching and writing activities of certain special Government employees. 5 C.F.R. § 2635.807(a)(2)(i)(4). The Ethics Pledge states that for purposes of paragraphs 6 and 7 the term "particular matter involving specific parties" will be defined as set forth in 5 C.F.R. § 2641.201(h) "except that it shall also include any meeting or other communication relating to the performance of one's official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties." Ethics Pledge, Sec. 2(s).

III. Analysis of Whether the *Draft EIS NOI* or *2019 BA* Should Be Categorized as "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties"

A. The *Draft EIS NOI* is a "Matter"

On December 29, 2017, Reclamation published the *Draft EIS NOI*[8] which set forth Reclamation's intent to prepare a programmatic environmental impact statement for analyzing potential modifications to the continued LTO of the CVP, for its authorized purposes, in a coordinated manner with the SWP, for its authorized purposes. *Draft EIS NOI*, 82 Fed. Reg. 61789 (Dec. 29, 2017). Reclamation proposed to evaluate alternatives that maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements; and to augment operational flexibility by addressing the status of listed species. *Id.* Reclamation sought suggestions and information on the alternatives and topics to be addressed and any other important issues related to the proposed action. *Id.*

After review, the DEO has determined that the discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI* do not constitute a "particular matter" (either a "particular matter involving specific parties" or a "particular matter of general applicability") and, therefore, DOI employees would not be required to recuse from participation in the *Draft EIS NOI* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge. This decision is consistent with prior DEO analysis and

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[8] Under the National Environmental Policy Act (NEPA), codified at 42 C.F.R. §4321 *et seq.*, a Federal agency must prepare an environmental impact statement (EIS) if it is proposing a major federal action significantly affecting the quality of the human environment. In this case, Reclamation and DWR propose to continue the long-term operation of the CVP and SWP to maximize water supply delivery and optimize power generation consistent with applicable laws, contractual obligations, and agreement; and to increase operational flexibility by focusing on non-operational measures to avoid significant adverse effects. Reclamation and DWR propose to store, divert, and convey water in accordance with existing water contracts and agreements, including water service and repayment contracts, settlement contracts, exchange contracts, and refuge deliveries, consistent with water rights and applicable laws and regulations. The proposed action includes habitat restoration that would not otherwise occur and provides specific commitments for habitat restoration.

The EIS process begins with publication of a Notice of Intent (NOI), stating the agency's intent to prepare an EIS for a particular proposal. The NOI is published in the Federal Register, and provides some basic information on the proposed action in preparation for the scoping process. The NOI provides a brief description of the proposed action and possible alternatives. It also describes the agency's proposed scoping process, including any meetings and how the public can get involved. The NOI will also contain an agency point of contact who can answer questions about the proposed action and the NEPA process. The scoping process is the best time to identify issues, determine points of contact, establish project schedules, and provide recommendations to the agency. The overall goal is to define the scope of issues to be addressed in depth in the analyses that will be included in the EIS.

interpretations of Environmental Impact Statements and is supported by the decision of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in Van Ee.

As discussed in Van Ee, whether an administrative proceeding is a "particular matter" is determined by the nature and focus of the governmental decision to be made or action to be taken as a result of the proceeding. Van Ee, 202 F.3d at 309. Only where the decision is focused on a probable particularized impact on discrete and identifiable parties is the proceeding considered a particular matter. *Id.* In Van Ee, the D.C. Circuit examined whether the public comment phase on a proposed EIS related to land use plans was a "particular matter," and determined that because the focus of the decision to be made by the agency following the public comment phase on the proposed EIS was not on the interests of particular groups or individuals, the public comment phase of a proposed EIS on a land use plan did not constitute a "particular matter." *Id.*

In this instance, Section VIII of the *Draft EIS NOI* identifies the following purposes: (1) to advise other agencies, CVP and SWP water users and power customers, affected tribes, and the public of Reclamation's intention to gather information to support the preparation of an EIS; (2) to obtain suggestions and information from other agencies, interested parties, and the public on the scope of alternatives and issues to be addressed in the EIS; and (3) to identify important issues raised by the public related to the development and implementation of the proposed action. *Draft EIS NOI*, 82 Fed. Reg. at 61791. Similar to the facts underlying the D.C. Circuit's decision in Van Ee, the deliberations and discussions leading up to the publication of the *Draft EIS NOI* and the potential impact of the EIS itself was not focused on the interests of a discrete and identifiable class of persons and, accordingly, it should not be categorized as a "particular matter" but rather as a "matter" as defined above.

In Van Ee, the D.C. Circuit noted the types of proposed actions generally set forth in EISs are focused on diverse sets of interests, such as how to reconcile or balance recreational, conservation, and commercial interests in a land use plan covering considerable territory. Van Ee, 202 F.3d at 309. Similarly, Section II of the *Draft EIS NOI*, notes that Reclamation intends to analyze potential modifications to the LTO of the CVP, in a coordinated manner with the SWP, to achieve the following goals:

- Maximize water supply delivery, consistent with applicable law, contracts and agreements, considering new and/or modified storage and export facilities.
- Review and consider modifications to regulatory requirements, including existing Reasonable and Prudent Alternative actions identified in the Biological Opinions issued by the USFWS and NMFS in 2008 and 2009, respectively.
- Evaluate stressors on fish other than CVP and SWP operations, beneficial non-flow measures to decrease stressors, and habitat restoration and other beneficial measures for improving targeted fish populations.
- Evaluate potential changes in laws, regulations and infrastructure that may benefit power marketability.

Draft EIS NOI, 82 Fed. Reg. at 61790. Additionally, Section III of the *Draft EIS NOI* states: "[t]he purpose of the action considered in this EIS is to continue the operation of

the CVP in a coordinated manner with the SWP, for its authorized purposes, in a manner that enables Reclamation and California Department of Water Resources to maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements; and to augment operational flexibility by addressing the status of listed species." *Id.*

Sections II and III of the *Draft EIS NOI* establish that the discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI*, focused on the broad policy option of remedying reduced availability of water for delivery south of the Delta by continuing operation of the CVP in a coordinated manner with the SWP in a manner that enables Reclamation and DWR to maximize water deliveries and optimize marketable power generation, consistent with applicable laws, contractual obligations, and agreements, while augmenting operational flexibility by addressing the status of listed species.

These discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI* did not focus on the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case; or on the interests of a discrete and identifiable class of persons. Therefore, they are not appropriately categorized as "particular matters" as defined in 5 C.F.R. § 2635.402(b)(3), 5 C.F.R. § 2640.103(a)(1), 5 C.F.R. § 2641.201(h)(1) ("particular matters involving specific parties"), or 5 C.F.R. § 2641.201(h)(2) ("particular matters of general applicability"). Rather, they were focused on the broad policy of restoring, at least in part, water supply, in consideration of all of the authorized purposes of the CVP as discussed in greater detail above. Accordingly, the discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI*, are appropriately categorized as "matters" and do not trigger the specific recusal and disqualification requirements that are applicable when an issue, decision, and/or action pending at the DOI is a "particular matter of general applicability" or a "particular matter involving specific parties." Consistent with this, DOI employees would not be required to recuse from participation in the *Draft EIS NOI* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

B. The *2019 BA* is a "Matter"

On August 2, 2016, Reclamation and DWR[9] requested reinitiation of Section 7 consultation under the Endangered Species Act of 1973 (ESA), codified at 16 U.S.C. § 1531 *et*

[9] While 5 C.F.R. § 2641.201(h)(1) includes "application" as an example of a "particular matter involving specific parties," in this case, DWR should not be considered an applicant as the word is traditionally defined. While DWR was listed as an applicant for the reinitiation of Section 7 consultation in 2016, they are not included as an author of the *2019 BA*, Indeed, based on available information, DWR is not applying for a specific permit or license to carry out an activity through the consultation process. Instead, DWR, along with BOR, requested reinitiation of formal consultation under Section 7 of the ESA on the continued operation of the CVP and the SWP, both of which are massive water projects serving multiple purposes throughout a large portion of the State of California. Further, under the consultation process set forth in Section 7 of the ESA, only federal agencies can request consultation from the USFWS and the NMFS to review the impacts proposed significant federal action. 16 U.S.C. § 1536. Accordingly,

seq., with the United States Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) on the Coordinated LTO of the CVP and SWP.[10] *2019 BA* at 1-1. The USFWS accepted the reinitiation request on August 3, 2016, and the NMFS accepted the reinitiation request on August 17, 2016. *Id.* The *2019 BA* supports Reclamation's consultation under Section 7 of the ESA, and documents the potential effects of the proposed actions[11] to provide

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identification of DWR as part of the "application" for the reinitiation request does not act to convert the *2019 BA* into a "particular matter involving specific parties."

[10] As codified in 16 U.S.C. § 1531, the purpose of the ESA is to protect and recover imperiled species and the ecosystems upon which they depend. It is administered by the USFWS and the NMFS. The USFWS has primary responsibility for terrestrial and freshwater organisms, while the responsibilities of NMFS are mainly marine wildlife such as whales and anadromous fish, such as salmon. Under the ESA, species may be listed as either endangered or threatened. "Endangered" means a species is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. § 1532(6). "Threatened" means a species is likely to become endangered within the foreseeable future. 16 U.S.C. § 1532(20). All species of plants and animals, except pest insects, are eligible for listing as endangered or threatened. For the purposes of the ESA, Congress defined species to include subspecies, varieties, and, for vertebrates, distinct population segments.

The ESA directs all Federal agencies to work to conserve endangered and threatened species and to use their authorities to further the purposes of the ESA. Section 7 of the ESA, called "Interagency Cooperation," is the mechanism by which Federal agencies ensure the actions they take, including those they fund or authorize, do not jeopardize the existence of any listed species or adversely modify or destroy critical habitats. 16 U.S.C. § 1536. Under Section 7, Federal agencies must consult with the USFWS (and/or NMFS as appropriate) when any action the agency carries out, funds, or authorizes (such as through a permit) *may affect* a listed endangered or threatened species. This process often begins as informal consultation. *Id.* A Federal agency, in the early stages of project planning, approaches the USFWS (and/or NMFS as appropriate) and requests informal consultation. Discussions between the agencies may include what types of listed species may occur in the proposed action area, and what effect the proposed action may have on those species. If it appears that the agency's action may affect a listed species, that agency may then prepare a biological assessment to assist in its determination of the project's effect on a species. 16 U.S.C. § 1536(c).

When a Federal agency determines, through a biological assessment or other review, that its action is *likely to adversely affect* a listed species, the agency submits to the USFWS (and/or NMFS as appropriate) a request for formal consultation. During formal consultation, the USFWS (and/or NMFS as appropriate) and the agency share information about the proposed project and the species likely to be affected. Formal consultation may last up to 90 days, after which the USFWS (and/or NMFS as appropriate) will prepare a biological opinion on whether the proposed activity will *jeopardize* the continued existence of a listed species. The USFWS (and/or NMFS as appropriate) has 45 days after completion of formal consultation to write the opinion. Please note that these timeframes may be extended upon agreement between the action agency and the services the USFWS (and/or NMFS as appropriate).

[11] The proposed action analyzed in the *2019 BA* centers on a Core Water Operation that provides for Reclamation and DWR to operate the CVP and SWP for water supply and to meet the requirements of State Water Resources Control Board (SWRCB) Water Right Decision 1641 (D-1641), along with other project purposes. *2019 BA* at 1-2. The Core Water Operation consists of operational actions that do not require subsequent concurrence or extensive coordination to define annual operation. *Id.* The proposed action also includes conservation measures designed to minimize or reduce the effects of the action on listed species. *Id.* In addition, the *2019 BA* and resulting consultation evaluates actions that will require

operational flexibility for the CVP and SWP, large-scale government programs that divert, store, and convey water throughout California for various purposes, on federally listed endangered and threatened species that have the potential to occur in the action area and critical habitat for these species. *Id.* It also fulfills consultation requirements for the Magnuson-Stevens Fishery Conservation and Management Act of 1976 for Essential Fish Habitat. *Id.*

As set forth in the *2019 BA*, several factors resulted in Reclamation requesting reinitiation of consultation under the ESA, including the apparent decline in the status of several listed species, new information related to recent multiple years of drought, and the evaluation of best available science. https://www.usbr.gov/mp/bdo/lto.html. The coordinated long-term operations of the CVP and SWP are currently subject to 2008 and 2009 biological opinions issued pursuant to Section 7 of the ESA. *2019 BA* at 1.1.2, 1-4-5. Each of these biological opinions included Reasonable and Prudent Alternatives to avoid the likelihood of jeopardizing the continued existence of listed species, or the destruction or adverse modification of critical habitat that were the subject of consultation. *Id.* In the *2019 BA*, Reclamation proposes to maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements, and to augment operational flexibility by addressing the status of listed species. https://www.usbr.gov/mp/bdo/lto.html.

After review, the DEO has determined that the *2019 BA* should not be categorized as either a "particular matter involving specific parties" or a "particular matter of general applicability," but rather as a "matter" as defined for purposes of this memorandum. Therefore, DOI employees would not be required to recuse from participation in the *2019 BA* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge. This decision is consistent with prior DEO analysis and interpretations of Biological Assessments (BAs) and Biological Opinions issued pursuant to the requirements of the ESA, and is supported by the decision of the D.C. Circuit in Van Ee.

Generally, a BA is a compilation of the information prepared by or under the direction of a Federal agency as part of its Section 7 consultation concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation of potential effects of the action on such species and habitat. 16 U.S.C. § 1536(c). A BA evaluates the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determines whether any such species or habitat are likely to be adversely affected by the proposed actions and is used in determining whether formal consultation or a conference is necessary. *Id.*

The *2019 BA* analyzes and includes as an environmental baseline, the past and present impacts of all federal, state, and private actions and other human activities in the action area, the anticipated impacts of all proposed federal projects in the action area that have already undergone formal or early Section 7 consultation, and the impact of certain state or private actions that are contemporaneous with the consultation in process, including the past and present

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further development and may change during repeated implementation as more information becomes available (*i.e.*, "adaptive management"). Adaptively managed actions will require additional coordination prior to implementation through program-specific teams established by Reclamation and DWR with input and participation from partner agencies and stakeholders. *Id.*

impacts of CVP and SWP operations under 2008 and 2009 biological opinions. *2019 BA* at 3-1-21. The BA also analyzes the effects of multiple physical, hydrological, and biological alterations that have negatively affected the species and habitat considered in the consultation with the USFWS and NMFS, including past, present, and ongoing effects of the existence of the CVP structures, as well as disconnected floodplains and drained tidal wetlands, levees, gold and gravel mining, gravel, timber production, marijuana cultivation, large woody debris, alterations to address effects, fish passage, spawning and rearing habitat augmentation, tidal marsh restoration, *etc. Id.* The *2019 BA* also sets forth a series of proposed actions that – if implemented – will work to maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements, and to augment operational flexibility while minimizing impact to listed species. *2019 BA* at 4-1-62; 5-1-498; 6-1-4.

Additionally, applying the D.C. Circuit's decision in Van Ee, BAs generally may not even constitute "particular matters," let alone "particular matters involving specific parties." As noted by the D.C. Circuit in Van Ee: "...whether an administrative proceeding is a 'particular matter' . . . is determined by the nature and focus of the governmental decision to be made or action to be taken as a result of the proceeding. Only where the decision is focused on a probable particularized impact on discrete and identifiable parties [is it a particular matter]." Van Ee, 202 F.3d at 309. As discussed above, the *2019 BA* is not focused on a probable particularized impact on discrete and identifiable parties. Instead, the *2019 BA* evaluates the potential effects of the action on a number of listed and proposed species and designated and proposed critical habitats, and determines whether any such species or habitat are likely to be adversely affected by the proposed actions and is used in determining whether formal consultation or a conference is necessary. *Id.* Moreover, the numerous proposed actions that the *2019 BA* discusses will work together to provide additional operational flexibility for the continued operation of the CVP and SWP, both of which, as described above in greater detail, are federal and state government projects that are enormous in geographical extent and impact on the people, wildlife, and environment of California. As a result, the proposed actions under review in the *2019 BA* take into account and have the potential to impact a wide and diverse sets of interests, and the *2019 BA* analyzes how to reconcile or balance recreational, conservation, and commercial interests in the operation of the CVP and SWP.

Accordingly, even though some of the issues, decisions, and actions undertaken by the DOI with respect to the preparation, development, drafting, discussion, and submission of the *2019 BA* may have a discernible impact on the interests of certain identifiable parties, the overall impact and focus of the proposed actions and decisions to be made are of a much broader nature, including the avoidance of jeopardizing the continued existence of a listed species and the destruction or adverse modification of designated critical habitat in connection with the continued operation of the CVP and the SWP. Consistent with this, the DOI's work on the *2019 BA* did not focus on the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case; or on the interests of a discrete and identifiable class of persons. Therefore, it is not appropriately categorized as a "particular matter" as defined in 5 C.F.R. § 2635.402(b)(3), 5 C.F.R. § 2640.103(a)(1), 5 C.F.R. § 2641.201(h)(1) ("particular matters involving specific parties"), or 5

C.F.R. § 2641.201(h)(2) ("particular matters of general applicability"). The *2019 BA* considered a wide range of diverse issues related to and the interests of the environmental, agricultural, industrial, municipal, business, academic, and recreational sectors. As result, the DOI's work on the *2019 BA* involved multifaceted discussions among representatives of those numerous sections and industries in a process that more closely resembles legislative policymaking than contracting, litigation, or negotiations. The issues, decisions, and actions undertaken by the DOI with respect to the preparation, development, drafting, discussion, and submission of the *2019 BA* are therefore appropriately characterized as a "matter" as defined for purposes of this memorandum, and DOI employees would not be required to recuse from participation in the *2019 BA* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

IV. Guidance On Assessing Whether Issues, Decisions, and/or Actions Involving the CVP and/or SWP Are "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties"

As set forth in greater detail above, the DEO has determined that both the *Draft EIS NOI* and the *2019 BA* are appropriately categorized as "matters" as defined in this memorandum. It is important to note that as work on the *Draft EIS NOI* and the *2019 BA* continues, it is possible that certain aspects of each, such as the implementation of certain underlying actions, interpretation of specific requirements, or the application of decisions on one sector, could develop into "particular matters of general applicability" or "particular matters involving specific parties." This, in turn, can implicate the recusal or disqualification requirements of 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

Accordingly, DOI employees should not assume that the conclusions of this memorandum are applicable to every EIS or BA, or to the entire lifecycle of either the *Draft EIS NOI* or the *2019 BA* at the DOI. Further, while the CVP and SWP projects taken as a whole at DOI are "matters" as defined in this memorandum, DOI employees should not conclude that each issue, decision, and/or action that impacts the CVP or SWP are also "matters." Instead, the DEO recommends that DOI employees assess whether the issues, decisions, and/or actions that they undertake with respect to the CVP and the SWP are best categorized as:

- broad policy options that are directed to the interests of a large and diverse group of persons;
- an issue, decision, and/or action focused on the interests of a discrete and identifiable class, such as a particular industry or profession; or
- a specific proceeding affecting the legal rights of certain parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.

In order to assist DOI employees in categorizing their work on CVP and SWP issues, decisions, and/or actions pending before the DOI, the DEO has prepared the chart below as a general reference guide. It sets forth the three general categories under the ethics laws and regulations and includes examples of certain issues, decisions, and/or actions involving the CVP

and SWP that could potentially be categorized as "matters," "particular matters of general applicability," or "particular matters involving specific parties."

CATEGORIES	EXAMPLES
"Matters" as defined in this memorandum • Broad policy options that are directed to the interests of a large and diverse group of persons	• *Draft EIS NOI* [as described above] • *2019 BA* [as described above] • Issue, decision, and/or action that impacts all industries and sectors involved with the CVP and/or SWP • CVP-wide operational and programmatic policy decisions
"Particular Matters of General Applicability" • Issue, decision, and/or action focused on the interests of a discrete and identifiable class, such as a particular industry or profession	• Issue impacting only the agricultural industry involved with the CVP and/or SWP • Decision limited only to hydroelectric power generators • Action focused only on municipal water issues • Anything that impacts an entire sector and/or industry or a subset of sectors and/or industries involved with and impacted by the CVP and/or SWP
"Particular Matters Involving Specific Parties" • Specific proceeding affecting the legal rights of certain parties or an isolatable transaction or related set of transactions between identified parties	• CVP Water Contracts • Litigation • Settlement Agreements • Permit for a specific party or parties • Specific request from individual(s) or entity(ies)

In every case, the categorization of issues, decisions, and/or actions will depend on the specific facts involved, and the DEO is available to provide specific guidance and assistance in making such determinations.

V. Conclusion

This memorandum reflects the current analysis and guidance of the DEO on how the types of issues, decisions, and/or actions involving the CVP and the DOI's coordination of operations with the SWP, should be categorized as "matters," "particular matters of general applicability," or "particular matters involving specific parties" pursuant to the definitions of those terms in ethics regulations and guidance from the OGE. As discussed in greater detail above, the DEO has determined that both the *Draft EIS NOI* and the *2019 BA* are "matters" as defined in this memorandum and, as such, DOI employees would not be required to recuse from participation in either the *Draft EIS NOI* or the *2019 BA* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

While there are other similar broad policy determinations impacting the entire CVP and/or SWP that would not constitute either "particular matters of general applicability" or "particular matters involving specific parties," the DEO notes that case-by-case factual analysis and ethics review will be required in many, if not most, circumstances in order to determine the appropriate categorization of issues, decisions, and/or actions undertaken at the DOI with respect to the CVP and the SWP. The DEO is available to provide further ethics guidance on this and other issues upon request.

March 20, 2017
LA-17-03

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
General Counsel

SUBJECT: Guidance on Executive Order 13770

Executive Order 13770 rescinds Executive Order 13490 and requires "appointees" to sign a new ethics pledge comprising several commitments. *See* E.O. 13770, sec. 1 (Jan. 28, 2017). Last month, the U.S. Office of Government Ethics (OGE) issued Legal Advisory LA-17-02 (Feb. 6, 2017) to provide initial guidance on Executive Order 13770. Subsequently, OGE discussed with the Counsel to the President's office OGE's prior guidance on Executive Order 13490 and the meaning of several paragraphs of Executive Order 13770. Based on these discussions, this Legal Advisory identifies the parts of OGE's issuances on Executive Order 13490 that are applicable to Executive Order 13770 and provides additional guidance.

I. Applicability of Prior Guidance to Executive Order 13770

As previously indicated, OGE's prior guidance on Executive Order 13490 is applicable to Executive Order 13770 to the extent that it addresses language common to both executive orders. Therefore, all substantive legal interpretations in the following Legal Advisories are applicable to Executive Order 13770: DO-09-005, DO-09-007, DO-09-010, DO-09-014, DO-09-020, DO-10-003, and LA-12-10. The following Legal Advisories remain valid in part, as specified in annotations that now appear in the versions posted on OGE's website: DO-09-003, DO-09-011, DO-10-004, and LA-16-08. For the convenience of ethics officials and employees, an enclosed table highlights certain language common to both executive orders and references prior guidance that is applicable to Executive Order 13770.

II. Paragraph 7: "Specific Issue Area"

Executive Order 13770 prohibits an appointee from participating in any particular matter on which the appointee lobbied during the two-year period before being appointed or in the "specific issue area" in which that particular matter falls. *See* E.O. 13770, sec. 1, par. 7; E.O. 13490, sec. 1, par. 3. The Counsel to the President's office has advised OGE that, as used in Executive Order 13770, the term "specific issue area" means a "particular matter of general applicability," and OGE has accepted the Administration's interpretation of this term. Although "specific issue" and "general issue area" are used in the context of the Lobbying Disclosure Act (LDA), the term "specific issue area" is not used in that context. *See* E.O. 13770, sec. 2; *see also*

2 U.S.C. §§ 1602, 1603(b)(5), 1604(b)(2). Although the term "specific issue area" appeared in Executive Order 13490, it was not defined in any guidance issued during the eight years in which that executive order remained in effect.

OGE has issued guidance distinguishing two types of particular matters: "particular matters involving specific parties" and "particular matters of general applicability." *See* 5 C.F.R. § 2640.102(l)-(m); *see also* OGE Inf. Adv. Op. 06 x 9 (2006). The latter is broader than the former. *Id*. This difference in breadth is relevant in determining the scope of the recusal, as illustrated in the following example:

> An appointee was a registered lobbyist during the two-year period before she entered government. In that capacity, she lobbied her agency against a proposed regulation focused on a specific industry. Her lobbying was limited to a specific section of the regulation affecting her client. Her recusal obligation as an appointee is not limited to the section of the regulation on which she lobbied, nor is it limited to the application of the regulation to her former client. Instead, she must recuse for two years from development and implementation of the entire regulation, subsequent interpretation of the regulation, and application of the regulation in individual cases.

III. Paragraphs 1 and 3: Post-Government Employment Lobbying Restrictions

The ethics pledge under Executive Order 13770 establishes two post-Government employment lobbying restrictions. The restriction in paragraph 1 of the ethics pledge prohibits a former appointee, for five years after terminating employment with an executive agency, from engaging in lobbying activities "with respect to" that agency. *See* E.O. 13770, sec. 1, par. 1. The restriction in paragraph 3 of the ethics pledge establishes the same restriction "with respect to" any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration. *See id*.; E.O. 13770 sec. 1, par. 3; sec. 2(c).

Executive Order 13770 relies partly on the definition of "lobbying activities" in the Lobbying Disclosure Act (LDA). *See* E.O. 13770, sec. 2(n). The LDA defines that term to include both "lobbying contacts" and behind-the-scenes efforts in support of such contacts. 2 U.S.C. § 1602(7). The LDA's definition of "lobbying contacts" is limited to certain types of communications and excludes 19 types of communications. 2 U.S.C. § 1602(8). Executive Order 13770 specifically excludes additional types of communications. *See* E.O. 13770, sec. 2(n).

For purposes of paragraph 1, lobbying activities are deemed to be carried out "with respect to" an agency only to the extent that they involve the following:

> (a) Any oral or written communication to a covered executive branch official of that agency; or

(b) Efforts that are intended, at the time of performance, to support a covered lobbying contact to a covered executive branch official of that agency.

For purposes of paragraph 3, the prohibition on lobbying activities "with respect to" a covered executive branch official or non-career Senior Executive Service appointee extends to non-career Senior Executive Service appointees. Therefore, lobbying activities in paragraph 3 involve the following:

(a) Any oral or written communication to a covered executive branch official or non-career Senior Executive Service appointee; or

(b) Efforts that are intended, at the time of performance, to support a covered lobbying contact to a covered executive branch official or non-career Senior Executive Service appointee of that agency.

For the convenience of ethics officials and employees, an enclosed table compares the post-Government employment lobbying restrictions in paragraphs 1 and 3.

Attachments

Applicability of Prior Guidance to Executive Order 13770
Attachment to LA-17-03

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Section 1. *Ethics Pledge.* Every appointee in every executive agency appointed on or after January 20, 2017, shall sign, and upon signing shall be contractually committed to, the following pledge upon becoming an appointee: As a condition, and in consideration, of my employment in the United States Government in an appointee position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:	Signing requirement ("appointee"): E.O. 13770, sec. 1 E.O. 13490, sec. 1 Definition of appointee: E.O. 13770, sec. 2(b) E.O. 13490, sec. 2(b)	Whether the following categories of employees are considered "appointees" for the purpose of signing the ethics pledge: • Acting officials and detailees: DO-09-010 • Appointees, generally: DO-09-003, DO-09-010 • Career officials appointed to confidential positions: DO-09-010 • Career Senior Executive Service (SES) members given Presidential appointments: DO-09-010 • Excepted service, generally: DO-09-010 • Foreign Service, similar positions: DO-09-010 • Holdover appointees: DO-09-010 • Individuals appointed to career positions: DO-09-003 • IPA detailees: DO-09-020 • Schedule C employees with no policymaking role: DO-09-010 • Special Government Employees (SGEs): DO-09-005, DO-09-010 • Temporary advisors/counselors pending confirmation to Presidentially appointed, Senate-confirmed (PAS) positions: DO-09-005 • Term appointees: DO-09-010
	Signing requirement ("shall sign"): E.O. 13770, sec. 1 E.O. 13490, sec. 1	When the ethics pledge must be signed: • Holdover appointees: DO-09-010, DO-09-014 • Nominees to PAS positions: DO-09-005 • Non-PAS who have already been appointed: DO-09-005 • Non-PAS who may be appointed in the future: DO-09-005 • Temporary advisors/counselors pending Senate confirmation to PAS positions: DO-09-005
Sec. 1, par. 2: If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions.	Restriction on communicating with employees of former agency: E.O. 13770, sec. 1, par. 2 E.O. 13490, sec. 1, par. 4	Guidance on the restriction: DO-10-004, LA-16-08 *Note: Ethics officials and employees may continue to rely on DO-10-004 regarding the substance of the restriction. Note, however, that the duration of this restriction in E.O. 13770 is one year and commences when the individual ceases to be a senior employee, whereas the duration of the corresponding restriction in E.O.13490 was two years, commencing when the appointee moves to a position that is not subject to the Pledge.*
Sec. 1, par. 5: I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee.	Prohibition on accepting gifts from registered lobbyists, lobbying orgs: E.O. 13770, sec. 1, par. 5 E.O. 13490, sec. 1, par. 1	Guidance on the lobbyist gift ban: DO-09-007, DO-10-003, LA-12-10 Relationship to 5 C.F.R. 2635, subpart B (Gifts from Outside Sources): DO-09-007, DO-10-003
	Definition of "gift": E.O. 13770, sec. 2(k) E.O. 13490, sec. 2(c)	Guidance on the following terms: • "Gift": DO-09-007 • "Solicited or accepted indirectly:" DO-09-007 Treatment of official speeches, accompanying staff: DO-10-003
	Definition of "registered lobbyist or lobbying organization": E.O. 13770, sec. 2(w) E.O. 13490, sec. 2(e)	Guidance on the term, "registered lobbyist or lobbying organization": DO-09-007 Treatment of the following: • 501(c)(3) organizations: DO-09-007, LA-12-10 • Clients of lobbyists/lobbying firms: DO-09-007 • Institutions of higher education: LA-12-10 • Media organizations: DO-09-007, LA-12-10

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Sec. 1, par. 6: I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.	Revolving door ban (incoming appointees): E.O. 13770, sec. 1, par. 6 E.O. 13490, sec. 1, par. 2	Guidance on the revolving door ban (incoming appointees): DO-09-011, DO-09-020 Relationship to impartiality regulations: DO-09-011
	Definition of "directly and substantially related to my former employer or former clients": E.O. 13770, sec. 2(d) E.O. 13490, sec. 2(k)	Guidance on the term, "directly and substantially related to": DO-09-011
	Definition of "former client": E.O. 13770, sec. 2(i) E.O. 13490, sec. 2(j)	Guidance on the term, "former client": DO-09-011 Treatment of the following: • Discrete, short-term engagements/*de minimis*: DO-09-011 • Federally funded research and development centers: DO-09-011 • Government entities: DO-09-011 • Nonprofit organizations: DO-09-011 • Service as a consultant: DO-09-011 • State or local colleges and universities: DO-09-011
	Definition of "former employer": E.O. 13770, sec. 2(j) E.O. 13490, sec. 2(i)	Guidance on the term, "former employer": DO-09-011 Treatment of the following: • Federally funded research and development centers: DO-09-011 • Government entities: DO-09-011 • State or local colleges and universities: DO-09-011 • Nonprofit organizations: DO-09-011
	Definition of "particular matter involving specific parties": E.O. 13770, sec. 2(s) E.O. 13490, sec. 2(h)	Guidance on the term, "particular matter involving specific parties": DO-09-011, DO-09-020 Treatment of the following: • Consultation with experts: DO-09-011 • Meetings, other communications: DO-09-011 • Official speeches: DO-09-020 • Open to all interested parties/multiplicity of parties: DO-09-011 • Rulemakings/regulations: DO-09-011

Paragraphs 1 and 3 in Executive Order 13770
Attachment to LA-17-03

<table>
<tr><th></th><th>Paragraph 1</th><th>Paragraph 3</th></tr>
<tr><td>Basic Prohibition</td><td>I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency. E.O. 13770, sec. 1, par. 1.</td><td>In addition to abiding by the limitations of paragraphs 1 and 2, I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration. E.O. 13770, sec. 1, par. 3.</td></tr>
<tr><td>Length of Restriction</td><td>5 years. E.O. 13770, sec. 1, par. 1.</td><td>Remainder of the Administration. E.O. 13770, sec. 1, par. 3</td></tr>
<tr><td>Commencement of Restriction</td><td>Termination of employment as an appointee. E.O. 13770, sec. 1, par. 1.</td><td>Termination of government service. E.O. 13770, sec. 1, par. 3</td></tr>
<tr><td>Restricted Activity</td><td colspan="2">Lobbying activities, as defined in the Lobbying Disclosure Act, but excluding certain types of communications. E.O. 13770, sec. 2(n). The term “lobbying activities” includes “lobbying contacts” and behind-the-scenes efforts in support of such contacts. 2 U.S.C. § 1602(7).
“Lobbying contacts” are limited to written or oral communications with covered officials that are made on behalf of a client. 2 U.S.C. § 1602(8)(A).
The term “lobbying activities” as defined in E.O. 13770 does not include communications and appearances with regard to: a judicial proceeding; a criminal or civil law enforcement inquiry, investigation, or proceeding; or any agency process for rulemaking, adjudication, or licensing, as defined in and governed by the Administrative Procedure Act, as amended, 5 U.S.C. 551 et seq.
The definition of “lobbying contact” includes 19 exceptions listed at 2 U.S.C. § 1602(8)(B). 2 U.S.C. § 1602(8)(B)(i)-(xix)
For example, the definition excludes “a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered executive branch official.” 2 U.S.C. § 1602(8)(B)(v).
The term “client” means any person or entity that employs or retains another person for financial or other compensation to conduct lobbying activities on behalf of that person or entity. 2 U.S.C. § 1602(2).
An activity is considered a “lobbying activity” whether or not a former appointee is required to register as a lobbyist. Therefore, there is no minimum requirement to engage in lobbying activities before the restrictions apply (i.e., no 20% service threshold). See E.O. 13770, sec. 2(n).</td></tr>
<tr><td rowspan="2">With Whom Appointees are Restricted From Engaging in Lobbying Activities</td><td>Covered executive branch officials <u>at the former appointee’s former agency</u>. E.O. 13770, sec. 1, par. 1 (“with respect to that agency”).
A communication to or appearance solely before a covered legislative branch official is not a lobbying activity “with respect to” the former appointee’s former agency. Id.
With respect to those appointees to whom component designations are applicable, “agency” means the separate and distinct component agencies designated in accordance with 18 U.S.C. § 207(h). E.O. 13770, sec. 2(e).</td><td>Covered executive branch officials <u>throughout the executive branch</u>. E.O. 13770, sec. 1, par. 3.

Non-career senior executive service appointees <u>throughout the executive branch</u>. E.O. 13770, sec. 1, par. 3.</td></tr>
<tr><td colspan="2">Covered executive branch officials are:
The President;
The Vice President;
Any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President;
Any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order;
Any member of the uniformed services whose pay grade is at or above O–7 under section 201 of title 37; and
Any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2)(B) of title 5. See E.O. 13770, sec. 2(c); 2 U.S.C. § 1602(3).</td></tr>
</table>

LA-17-03: Guidance on Executive Order 13770

U.S. Office of Government Ethics
Advanced Practitioner Webinar
Thursday, April 27, 2017

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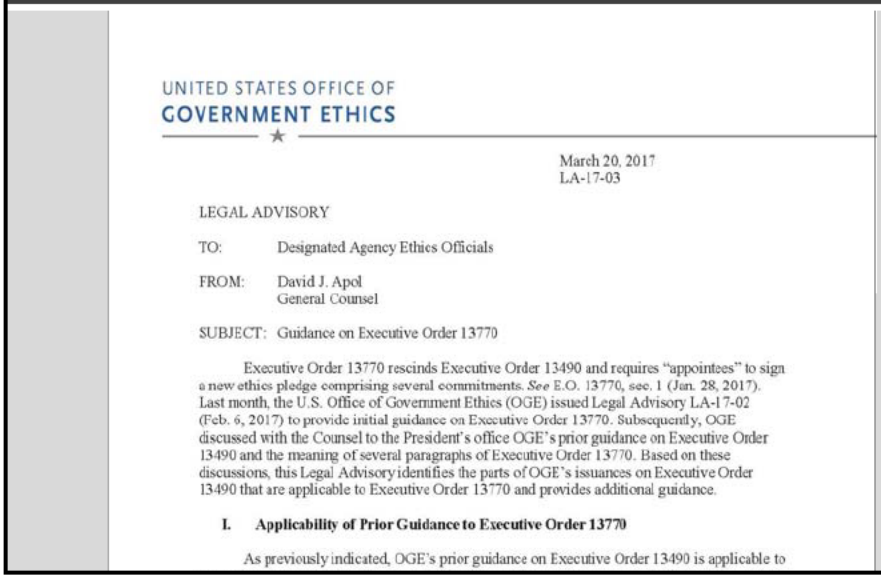
LA-17-03: Guidance on E.O. 13770



UNITED STATES OFFICE OF
GOVERNMENT ETHICS

March 20, 2017
LA-17-03

LEGAL ADVISORY

TO: Designated Agency Ethics Officials

FROM: David J. Apol
General Counsel

SUBJECT: Guidance on Executive Order 13770

Executive Order 13770 rescinds Executive Order 13490 and requires "appointees" to sign a new ethics pledge comprising several commitments. *See* E.O. 13770, sec. 1 (Jan. 28, 2017). Last month, the U.S. Office of Government Ethics (OGE) issued Legal Advisory LA-17-02 (Feb. 6, 2017) to provide initial guidance on Executive Order 13770. Subsequently, OGE discussed with the Counsel to the President's office OGE's prior guidance on Executive Order 13490 and the meaning of several paragraphs of Executive Order 13770. Based on these discussions, this Legal Advisory identifies the parts of OGE's issuances on Executive Order 13490 that are applicable to Executive Order 13770 and provides additional guidance.

I. Applicability of Prior Guidance to Executive Order 13770

As previously indicated, OGE's prior guidance on Executive Order 13490 is applicable to

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What is Covered in LA-17-03? (Past Guidance)

- Elaboration on Guidance in LA-17-02
  - Extent to which past guidance is applicable to EO 13770
  - Extent to which past guidance is NOT applicable or NOT relevant to EO 13770

3

What is Covered in LA-17-03? (New Guidance)

- LA-17-03 also addresses recusal obligations for recent lobbyists (pledge paragraph 7)
- Post-government employment restrictions
  - 5-year restriction under pledge paragraph 1
  - Administration-length restriction under pledge paragraph 3
  - Citations to – but not interpretations of – the Lobbying Disclosure Act (LDA)

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What is Not Covered in LA-17-03?

- Section 3 of the new Executive Order concerning pledge waivers
- Paragraph 4 concerning post-government restrictions and the Foreign Agents Registration Act of 1938
- Paragraph 8 concerning employment decisions
- The continued applicability of EO 13490

5

Language Common to E.O. 13770 and E.O. 13490

6

LA-17-02: Executive Order 13770

"With respect to Executive Order 13770, ethics officials and employees may continue to rely on OGE's prior guidance regarding Executive Order 13490 to the extent that such guidance addresses language common to both orders."

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LA-17-03: Guidance on E.O. 13770

SUBJECT: Guidance on Executive Order 13770

Executive Order 13770 rescinds Executive Order 13490 and requires "appointees" to sign a new ethics pledge comprising several commitments. *See* E.O. 13770, sec. 1 (Jan. 28, 2017). Last month, the U.S. Office of Government Ethics (OGE) issued Legal Advisory LA-17-02 (Feb. 6, 2017) to provide initial guidance on Executive Order 13770. Subsequently, OGE discussed with the Counsel to the President's office OGE's prior guidance on Executive Order 13490 and the meaning of several paragraphs of Executive Order 13770. Based on these discussions, this Legal Advisory identifies the parts of OGE's issuances on Executive Order 13490 that are applicable to Executive Order 13770 and provides additional guidance.

I. Applicability of Prior Guidance to Executive Order 13770

As previously indicated, OGE's prior guidance on Executive Order 13490 is applicable to Executive Order 13770 to the extent that it addresses language common to both executive orders. Therefore, all substantive legal interpretations in the following Legal Advisories are applicable to Executive Order 13770: DO-09-005, DO-09-007, DO-09-010, DO-09-014, DO-09-020, DO-10-003, and LA-12-10. The following Legal Advisories remain valid in part, as specified in annotations that now appear in the versions posted on OGE's website: DO-09-003, DO-09-011, DO-10-004, and LA-16-08. For the convenience of ethics officials and employees, an enclosed table highlights certain language common to both executive orders and references prior guidance that is applicable to Executive Order 13770.

II. Paragraph 7: "Specific Issue Area"

Executive Order 13770 prohibits an appointee from participating in any particular matter on which the appointee lobbied during the two-year period before being appointed or in the "specific issue area" in which that particular matter falls. *See* E.O. 13770, sec. 1, par. 7; E.O. 13490, sec. 1, par. 3. The Counsel to the President's office has advised OGE that, as used in Executive Order 13770, the term "specific issue area" means a "particular matter of general applicability," and OGE has accepted the Administration's interpretation of this term. Although "specific issue" and "general issue area" are used in the context of the Lobbying Disclosure Act

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Example:

DO-09-010: Who Must Sign the Ethics Pledge?

Note: All substantive legal interpretations in this advisory are applicable to Executive Order 13770, sec 1
See LA-17-02 and LA-17-03

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 16, 2009
DO-09-010

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Who Must Sign the Ethics Pledge?

The Office of Government Ethics (OGE) has received numerous questions concerning

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Example:

DO-09-011: Revolving Door Ban—All Appointees Entering Gov't

NOTE: All substantive legal interpretations in this advisory concerning Pledge paragraph 2 (E O 13490) and the terms used in Pledge paragraph 2 are applicable to Executive Order 13770, sec 1, par 6 All substantive legal interpretations pertaining to waivers of the Ethics Pledge are not applicable to Executive Order 13770, sec 3 *See* LA-17-02 and LA-17-03

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 26, 2009
DO-09-011

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Ethics Pledge: Revolving Door Ban--All Appointees Entering Government

Executive Order 13490 requires any covered "appointee" to sign an Ethics Pledge that

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Example:

DO-10-004: FAQs on Post-Employment under the Ethics Pledge

Note Please see the attached addendum for the applicability of substantive legal interpretations in this advisory to Executive Order 13770. *See also* LA-17-02 and LA-17-03.

Addendum (March 20, 2017)
DO-10-004: Post-Employment Under the Ethics Pledge: FAQs

The following substantive legal interpretations in this advisory are **applicable** to Executive Order 13770:

- Part A: Post-employment cooling-off period. *See* E.O. 13770, sec. 1, par. 2.
  - Q2. Which appointees are subject to the restriction
  - Q3. How the restriction affects very senior employees
  - Q4. Which officials may not be contacted under this restriction
  - Q5. Applicability of exceptions under 18 U.S.C. § 207(c) to the restriction
- Part B: Post-employment lobbying ban. *See* E.O. 13770, sec. 1, par. 3.
  - Q1. Relationship of the lobbying ban to other restrictions
  - Q2. Whether the lobbying ban applies to appointees who are not senior employees
  - Q5. Duration of the lobbying ban
  - Q11. Whether exceptions to the restriction exist

The following substantive legal interpretations in this advisory are **applicable in part** to Executive Order 13770, to the extent that they address the core questions listed below. However, because the post-employment ban in Executive Order 13490 restricts "lobbying," while the corresponding ban in

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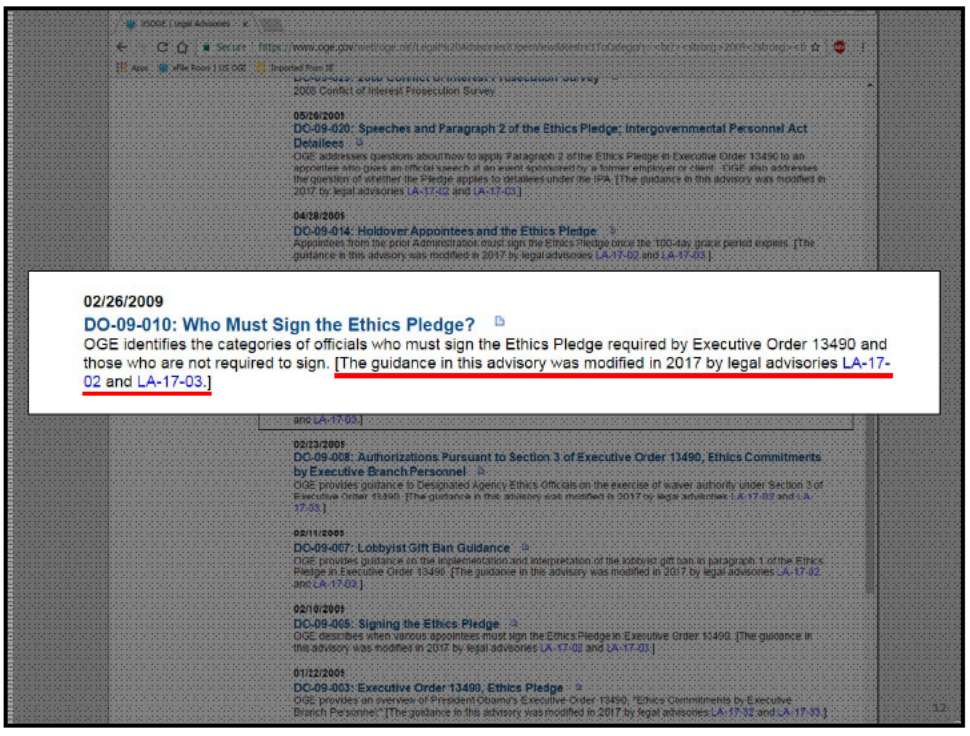

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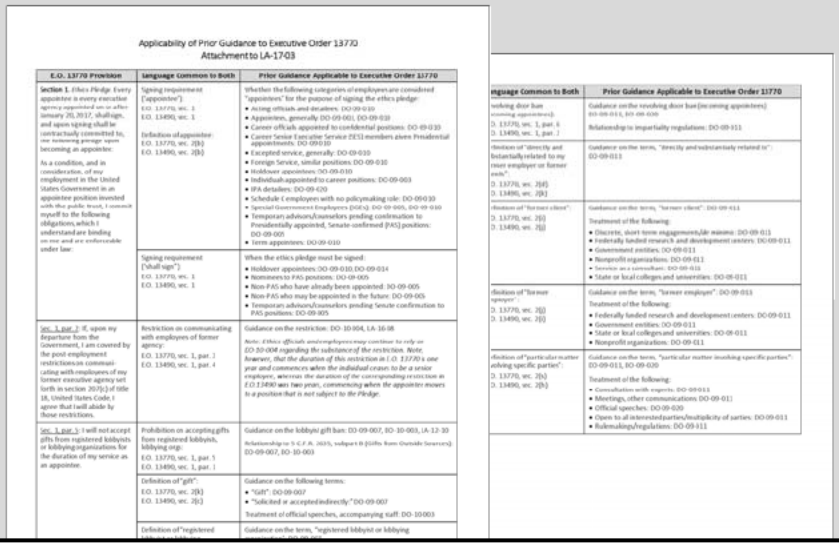
Attachment to LA-17-03



Applicability of Prior Guidance to Executive Order 13770
Attachment to LA-17-03

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Section 1. *Ethics Pledge.* Every appointee in every executive agency appointed on or after January 20, 2017, shall sign, and upon signing shall be contractually committed to, the following pledge upon becoming an appointee: As a condition, and in consideration, of my employment in the United States Government in an appointee position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:	Signing requirement ("appointee"): E.O. 13770, sec. 1 E.O. 13490, sec. 1 Definition of appointee: E.O. 13770, sec. 2(b) E.O. 13490, sec. 2(b)	Whether the following categories of employees are considered "appointees" for the purpose of signing the ethics pledge: • Acting officials and deputies: DO-09-010 • Appointees, generally: DO-09-001, DO-09-010 • Career officials appointed to confidential positions: DO-09-010 • Career Senior Executive Service (SES) members above Presidential appointments: DO-09-010 • Excepted service, generally: DO-09-010 • Foreign Service, similar positions: DO-09-010 • Holdover appointees: DO-09-010 • Individuals appointed to career positions: DO-09-003 • IPA detailees: DO-09-020 • Schedule C employees with no policymaking role: DO-09-010 • Special Government Employees (SGEs): DO-09-005, DO-09-010 • Temporary advisors/counselors pending confirmation to Presidentially appointed, Senate-confirmed (PAS) positions: DO-09-005 • Term appointees: DO-09-010
	Signing requirement ("shall sign"): E.O. 13770, sec. 1 E.O. 13490, sec. 1	When the ethics pledge must be signed: • Holdover appointees: DO-09-010, DO-09-014 • Nominees to PAS positions: DO-09-005 • Non-PAS who have already been appointed: DO-09-005 • Non-PAS who may be appointed in the future: DO-09-005 • Temporary advisors/counselors pending Senate confirmation to PAS positions: DO-09-005
Sec. 1, par. 2: If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with employees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions.	Restriction on communicating with employees of former agency: E.O. 13770, sec. 1, par. 2 E.O. 13490, sec. 1, par. 4	Guidance on the restriction: DO-10-004, LA-16-08 *Note: Ethics officials and employees may continue to rely on DO-10-004 regarding the substance of the restriction. Note, however, that the duration of this restriction in E.O. 13770 is one year and commences when the individual ceases to be a senior employee, whereas the duration of the corresponding restriction in E.O. 13490 was two years, commencing when the appointee moves to a position that is not subject to the Pledge.*
Sec. 1, par. 3: I will not accept gifts from registered lobbyists or lobbying organizations for the duration of my service as an appointee.	Prohibition on accepting gifts from registered lobbyists, lobbying org: E.O. 13770, sec. 1, par. 3 E.O. 13490, sec. 1, par. 3	Guidance on the lobbyist gift ban: DO-09-007, IO-10-003, LA-12-10 Relationship to 5 C.F.R. 2635, subpart B (Gifts from Outside Sources): DO-09-007, IO-10-003
	Definition of "gift": E.O. 13770, sec. 2(k) E.O. 13490, sec. 2(c)	Guidance on the following terms: • "Gift": DO-09-007 • "Solicited or accepted indirectly": DO-09-007 Treatment of official speeches, accompanying staff: DO-10-003
	Definition of "registered	Guidance on the term, "registered lobbyist or lobbying

Language Common to Both	Prior Guidance Applicable to Executive Order 13770
volving door ban ncoming appointees): D. 13770, sec. 1, par. 6 D. 13490, sec. 1, par. 2	Guidance on the revolving door ban (incoming appointees): DO-09-011, IO-09-020 Relationship to impartiality regulations: DO-09-011
finition of "directly and bstantially related to my rmer employer or former ents": D. 13770, sec. 2(d) D. 13490, sec. 2(b)	Guidance on the terms, "directly and substantially related to": DO-09-011
finition of "former client": D. 13770, sec. 2(i) D. 13490, sec. 2(j)	Guidance on the term, "former client": DO-09-011 Treatment of the following: • Discrete, short-term engagements/de minimis: DO-09-011 • Federally funded research and development centers: DO-09-011 • Government entities: DO-09-011 • Nonprofit organizations: DO-09-011 • Service as a consultant: DO-09-011 • State or local colleges and universities: DO-09-011
finition of "former ployer": D. 13770, sec. 2(j) D. 13490, sec. 2(i)	Guidance on the term, "former employer": DO-09-011 Treatment of the following: • Federally funded research and development centers: DO-09-011 • Government entities: DO-09-011 • State or local colleges and universities: DO-09-011 • Nonprofit organizations: DO-09-011
finition of "particular matter olving specific parties": D. 13770, sec. 2(h) D. 13490, sec. 2(h)	Guidance on the term, "particular matter involving specific parties": DO-09-011, IO-09-020 Treatment of the following: • Consultation with experts: DO-09-011 • Meetings, other communications: DO-09-011 • Official speeches: DO-09-020 • Open to all interested parties/multiplicity of parties: DO-09-011 • Rulemakings/regulations: DO-09-011

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Language Common to Both

E.O. 13370, sec. 1, par. 6

I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

E.O. 13490, sec. 1, par. 2

I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

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Language Common to Both

E.O. 13370, sec. 2(b)

"Appointee" means every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

E.O. 13490, sec. 2(b)

"Appointee" shall include every full-time, non-career Presidential or Vice-Presidential appointee, non-career appointee in the Senior Executive Service (or other SES-type system), and appointee to a position that has been excepted from the competitive service by reason of being of a confidential or policymaking character (Schedule C and other positions excepted under comparable criteria) in an executive agency. It does not include any person appointed as a member of the Senior Foreign Service or solely as a uniformed service commissioned officer.

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Attachment to LA-17-03

E.O. 13770 Provision	Language Common to Both	Prior Guidance Applicable to Executive Order 13770
Section 1. *Ethics Pledge*. Every appointee in every executive agency appointed on or after January 20, 2017, shall sign, and upon signing shall be contractually committed to, the following pledge upon becoming an appointee: As a condition, and in consideration, of my employment in the United States Government in an appointee position invested with the public trust, I commit myself to the following obligations, which I understand are binding on me and are enforceable under law:	Signing requirement ("appointee"): E.O. 13770, sec. 1 E.O. 13490, sec. 1 Definition of appointee: E.O. 13770, sec. 2(b) E.O. 13490, sec. 2(b)	Whether the following categories of employees are considered "appointees" for the purpose of signing the ethics pledge: • Acting officials and detailees: DO-09-010 • Appointees, generally: DO-09-003, DO-09-010 • Career officials appointed to confidential positions: DO-09-010 • Career Senior Executive Service (SES) members given Presidential appointments: DO-09-010 • Excepted service, generally: DO-09-010 • Foreign Service, similar positions: DO-09-010 • Holdover appointees: DO-09-010 • Individuals appointed to career positions: DO-09-003 • IPA detailees: DO-09-020 • Schedule C employees with no policymaking role: DO-09-010 • Special Government Employees (SGEs): DO-09-005, DO-09-010 • Temporary advisors/counselors pending confirmation to Presidentially appointed, Senate-confirmed (PAS) positions: DO-09-005 • Term appointees: DO-09-010
	Signing requirement ("shall sign"): E.O. 13770, sec. 1 E.O. 13490, sec. 1	When the ethics pledge must be signed: • Holdover appointees: DO-09-010, DO-09-014 • Nominees to PAS positions: DO-09-005 • Non-PAS who have already been appointed: DO-09-005 • Non-PAS who may be appointed in the future: DO-09-005 • Temporary advisors/counselors pending Senate confirmation to PAS positions: DO-09-005

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Paragraph 7:
Particular Matter & Specific Issue Area

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment . . .
I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7: Specific Issue Area

"Specific issue area" is not defined in LDA or Executive Orders 13490 or 13770

EO 13490

- Also contained a two-year prohibition on individuals seeking or accepting employment with executive agencies they lobbied

EO 13770

- No employment ban for former lobbyists

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Paragraph 7: PMGA

As used in Executive Order 13770, the term "specific issue area" means a "**particular matter of general applicability**"

If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 6, I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

22

Paragraph 7

Lobbied on:	→	Recusal:
Particular Matter	→	Same Particular Matter

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

23

Paragraph 7

Lobbied on:	→	Recusal:
Particular Matter	→	Same Particular Matter
Matter	→	No Recusal to that Matter

If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraph 7

If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 6, I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Ethics Pledge: Restrictions for Incoming Appointees

Paragraph 6 *Not limited to registered lobbyists*	I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.
Paragraph 7 *Limited to registered lobbyists*	If I was a registered lobbyist within the 2 years before the date of my appointment . . . I will not for a period of 2 years after the date of my appointment participate in any particular matter on which I lobbied within the 2 years before the date of my appointment or participate in the specific issue area in which that particular matter falls.

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Paragraphs 1 and 3:

Post-Employment Lobbying Activity Restrictions

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Ethics Pledge: Post-Employment Restrictions

Paragraph 1	I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.
Paragraph 2	If, upon my departure from the Government, I am covered by the post-employment restrictions on communicating with appointees of my former executive agency set forth in section 207(c) of title 18, United States Code, I agree that I will abide by those restrictions.
Paragraph 3	I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.
Paragraph 4	I will not, at any time after the termination of my employment in the United States Government, engage in any activity on behalf of any foreign government or foreign political party which, were it undertaken on January 20, 2017, would require me to register under the Foreign Agents Registration Act of 1938, as amended.

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

29

Paragraph 1

I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.

30

Paragraph 3

I also agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Restricted Activity

- Engage in a "lobbying activity" as defined by the Lobbying Disclosure Act (LDA)

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Engage in a Lobbying Activity

You engage in a "**lobbying activity**" if you:

- Make a lobbying contact
  - Written or oral communications
  - With covered executive or legislative branch officials
  - On behalf of a client
  - For financial or other compensation
  - 19 exceptions

OR

- Engage in behind-the-scenes efforts in support of such lobbying contact

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Paragraph 1: "With respect to" that agency

A lobbying activity occurs "with respect to" that agency if the activity involves :

- A communication to a covered executive branch official at that agency *(component designations may be available)*

OR

- Efforts intended, at the time of performance, to support such a communication to a covered executive branch official at that agency

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Paragraph 3: "With respect to" certain officials

A lobbying activity occurs "with respect to" certain officials if the activity involves :

- A communication to a covered executive branch official or non-career SES

OR

- Efforts intended, at the time of performance, to support such a communication to a covered executive branch official or non-career SES

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency = Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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Paragraphs 1 and 3: Post-Employment Lobbying Activity Restrictions

	Paragraph 1	Paragraph 3
RESTRICTED ACTIVITY	Lobbying Activities	
WITH RESPECT TO	Former appointee's former agency ***MEANS:*** Covered executive branch officials at former appointee's former agency	Covered executive branch officials throughout the executive branch. Non-career senior executive service appointees throughout the executive branch.
LENGTH OF RESTRICTION	5 years	Remainder of the Administration
COMMENCEMENT OF RESTRICTION	Termination of employment as appointee	Termination of Government Service

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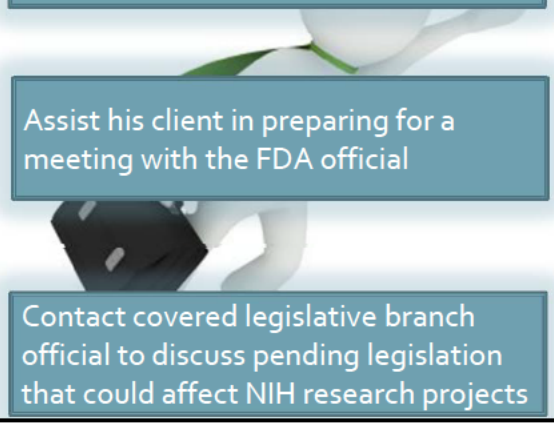
Paragraph 3: Examples

- Write to various exec branch officials seek support for his client's research
- Assist his client in preparing for a meeting with one of the officials
- Assist his client in understanding grant application process and guidelines that agency established for research projects
- Request the status of an action affecting his client.

I agree, upon leaving Government service, not to engage in lobbying activities with respect to any covered executive branch official or non-career Senior Executive Service appointee for the remainder of the Administration.

40

Paragraph 1: Examples



I will not, within 5 years after the termination of my employment as an appointee in any executive agency in which I am appointed to serve, engage in lobbying activities with respect to that agency.

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LA-17-03: Guidance on Executive Order 13770

U.S. Office of Government Ethics
Advanced Practitioner Webinar
Thursday, April 27, 2017

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NOTE: All substantive legal interpretations in this advisory concerning Pledge paragraph 2 (E.O. 13490) and the terms used in Pledge paragraph 2 are applicable to Executive Order 13770, sec. 1, par. 6. All substantive legal interpretations pertaining to waivers of the Ethics Pledge are not applicable to Executive Order 13770, sec. 3. *See* LA-17-02 and LA-17-03.

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

March 26, 2009
DO-09-011

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Ethics Pledge: Revolving Door Ban--All Appointees Entering Government

Executive Order 13490 requires any covered "appointee" to sign an Ethics Pledge that includes several commitments. 74 Fed. Reg. 4673 (January 26, 2009). OGE Memorandum DO-09-003 explains the definition of appointee, describes the commitments included in the Pledge, and provides a Pledge Form to be used for appointees.[1] The purpose of the present memorandum is to advise ethics officials on how to implement paragraph 2 of the Pledge, "Revolving Door Ban--All Appointees Entering Government."

Paragraph 2 of the Pledge requires an appointee to commit that he or she will not, for a period of two years following appointment, participate in any particular matter involving specific parties that is directly and substantially related to his or her former employer or former clients, including regulations and contracts. Exec. Order No. 13490 sec. 1(2). To help agencies implement this requirement, OGE is providing the following explanation of the phrases that comprise paragraph 2 of the Pledge and of how paragraph 2 interacts with existing impartiality regulations.

Understanding the Meaning of the Terms that Comprise Paragraph 2 of the Pledge

"Particular matter involving specific parties"

In order to determine whether an appointee's activities concern any particular matters involving specific parties, ethics officials must follow the definition of that phrase found in section 2(h) of the Executive Order. That definition incorporates the longstanding interpretation of particular matter involving specific parties reflected in 5 C.F.R. § 2641.201(h). However, it also expands the scope of the term to include any meeting or other communication with a former employer or former client relating to the performance of the appointee's official duties, unless

[1] https://www.oge.gov/Web/oge.nsf/Resources/DO-09-003:+Executive+Order+13490,+Ethics+Pledge.

the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties. The purpose of this expansion of the traditional definition is to address concerns that former employers and clients may appear to have privileged access, which they may exploit to influence an appointee out of the public view.[2]

The expanded party matter definition has a two-part exception for communications with an appointee's former employer or client, if the communication is: (1) about a particular matter of general applicability and (2) is made at a meeting or other event at which participation is open to all interested parties. Although the exception refers to particular matters of general applicability, it also is intended to cover communications and meetings regarding policies that do not constitute particular matters. An appointee may participate in communications and meetings with a former employer or client about these particular or non-particular matters if the meeting or event is "open to all interested parties." Exec. Order No. 13490 sec. 2(h). Because meeting spaces are typically limited, and time and other practical considerations also may constrain the size of meetings, common sense demands that reasonable limits be placed on what it means to be "open to all interested parties." Such meetings do not have to be open to every comer, but should include a multiplicity of parties. For example, if an agency is holding a meeting with five or more stakeholders regarding a given policy or piece of legislation, an appointee could attend such a meeting even if one of the stakeholders is a former employer or former client; such circumstances do not raise the concerns about special access at which the Executive Order is directed. Additionally, the Pledge is not intended to preclude an appointee from participating in rulemaking under section 553 of the Administrative Procedure Act simply because a former employer or client may have submitted written comments in response to a public notice of proposed rulemaking.[3] In any event, agency ethics officials will have to exercise judgment in determining whether a specific forum qualifies as a meeting or other event that is "open to all interested parties," and OGE is prepared to assist with this analysis.

"Particular matter involving specific parties…including regulations"

Because regulations often are cited as examples of particular matters that do not involve specific parties, OGE wants to emphasize that the phrase is not intended to suggest that all rulemakings are covered. Rather, the phrase is intended to serve as a reminder that regulations sometimes may be particular matters involving specific parties, although in rare circumstances. As OGE has observed in connection with 18 U.S.C. § 207, certain rulemakings may be so focused on the rights of specifically identified parties as to be considered a particular matter

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2 Note, however, that the expanded definition of party matter is not intended to interfere with the ability of appointees to consult with experts at educational institutions and "think tanks" on general policy matters, at least where those entities do not have a financial interest, as opposed to an academic or ideological interest. See Office of Legal Counsel Memorandum, "Financial Interests of Nonprofit Organizations," January 11, 2006 (distinguishing between financial interests and advocacy interests of nonprofits), http://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/05/29/op-olc-v030-p0064.pdf; cf. 5 C.F.R. § 2635.502(b)(1)(v)(Note)(OGE impartiality rule does not require recusal because of employee's political, religious or moral views).

3 For other reasons discussed below, however, rulemaking sometimes may constitute a particular matter involving specific parties, albeit rarely

involving specific parties.[4] Such rulemakings likewise are covered by paragraph 2.

"Directly and substantially related to"

The phrase "directly and substantially related to," as defined in section 2(k) of the Executive Order, means only that the former employer or client is a party or represents a party to the matter. Ethics officials should be familiar with this concept from 5 C.F.R. § 2635.502(a).

"Former employer or former client"

In order to determine who qualifies as an appointee's former employer or former client, ethics officials must follow the definitions of each phrase found in section 2(i) and 2(j), respectively, of the Executive Order. In effect, the Executive Order splits the treatment of former employer found in the impartiality regulations into two discrete categories, "former employer" and "former client," and removes contractor from the definition of either term. *See* 5 C.F.R. §§ 2635.502(b)(1)(iv), 2635.503(b)(2).

Former Employer

For purposes of the Pledge, a former employer is any person for whom the appointee has, within the two years prior to the date of his or her appointment, served as an employee, officer, director, trustee, or general partner, unless that person is an agency or entity of the Federal Government, a state or local government, the District of Columbia, a Native American tribe, or any United States territory or possession. Exec. Order No. 13490, sec. 2(i). While the terms employee, officer, director, trustee, or general partner generally follow existing ethics laws and guidance, OGE has received questions about the scope of the exclusion for government entities from the definition of former employer, specifically with regard to public colleges and universities. The exclusion for state or local government entities does extend to a state or local college or university.[5]

OGE also has received several questions about whether the definition of former employer includes nonprofit organizations. Consistent with the interpretation of similar terms in other ethics rules and statutes, the definition of former employer in the Executive Order covers

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[4] S*ee, e.g,.* 73 Fed. Reg. 36168, 36176 (June 25, 2008); *see also* OGE Informal Advisory Letter 96 x 7, n.1.

[5] *See* OGE Informal Advisory Opinion 93 x 29 n.1 where OGE held that for purposes of applying the supplementation of salary restrictions in 18 U.S.C. § 209, the exception for payments from the treasury of any state, county, or municipality included a state university. OGE cautions, however, that the exclusion for state and local entities may not extend to all entities affiliated with a state or local college or university. OGE notes that some colleges and universities may create mixed public/private entities in partnership with commercial enterprises. Such entities should not automatically be considered as falling within the exclusion, but rather should be examined on a case-by-case basis to determine whether they should be viewed as instrumentalities of state or local government for the purposes of the Executive Order.

nonprofit organizations.[6] Moreover, it includes nonprofit organizations in which an appointee served without compensation, provided of course that the appointee actually served as an employee, officer, director, trustee, or general partner of the organization. Thus, for example, the recusal obligations of Pledge paragraph 2 would apply to an appointee who had served without pay on the board of directors or trustees of a charity, provided that the position involved the fiduciary duties normally associated with directors and trustees under state nonprofit organization law. This does not include, however, purely honorific positions, such as "honorary trustee" of a nonprofit organization. It also does not include unpaid positions as a member of an advisory board or committee of a nonprofit organization, unless the position involved fiduciary duties of the kind exercised by officers, directors or trustees, or involved sufficient supervision by the organization to create a common law employee-employer relationship (which is not typical, in OGE's experience).

Former Client

For purposes of the Pledge, a former client means any person for whom the appointee served personally as an agent, attorney, or consultant within two years prior to date of appointment. Exec. Order No. 13490 sec. 2(j). A former client does not include a client of the appointee's former employer to whom the appointee did not personally provide services. Therefore, although an appointee's former law firm provided legal services to a corporation, the corporation is not a former client of the appointee for purposes of the Pledge if the appointee did not personally render legal services to the corporation. Moreover, based on discussions with the White House Counsel's office, OGE has determined that the definition of former client is intended to exclude the same governmental entities as those excluded from the definition of former employer. Thus, for example, an appointee who had provided legal services to the Department of Energy would not be prohibited from participating personally in particular matters in which the Department is a party.

In addition, the term former client includes nonprofit organizations. However, a former client relationship is not created by service to a nonprofit organization in which an appointee participated solely as an unpaid advisory committee or advisory board member with no fiduciary duties. Although a former client includes any person whom the appointee served as a "consultant," OGE has not construed the term consultant, as used in analogous provisions of the Ethics in Government Act and the Standards of Ethical Conduct, to include unpaid, non-fiduciary advisory committee members of a nonprofit organization. *See* 5 U.S.C. app. § 102(a)(6)(A)(disclosure of consultant positions); 5 C.F.R. § 2635.502(b)(1)(iv)(covered relationship as former consultant). Likewise, former client does not include a nonprofit organization in which an appointee served solely in an honorific capacity.

[6] For similar reasons, Federally-funded research and development centers (FFRDCs), whether nonprofit or for profit, are intended to be included in the definitions of former employer and former client for purposes of paragraph 2 of the Pledge.

The definition of former client specifically excludes "instances where the service provided was limited to a speech or similar appearance." Exec. Order No. 13490, sec. 2(j). In addition to excluding all activities that consist merely of speaking engagements, this provision is intended to exclude other kinds of discrete, short-term engagements, including certain de minimis consulting activities. Essentially, the Pledge is not intended to require a two-year recusal based on activities so insubstantial that they are not likely to engender the kind of lingering affinity and mixed loyalties at which the Executive Order is directed. The exclusion for speaking and similar engagements was added to emphasize that the provision focuses on services that involved a significant working relationship with a former client. Therefore, the exclusion is not limited to speeches and speech-like activities (such as serving on a seminar panel or discussion forum), but includes other activities that similarly involve a brief, one-time service with little or no ongoing attachment or obligation. In order to determine whether any services were de minimis, ethics officials will need to consider the totality of the circumstances, including the following factors:

- the amount of time devoted;
- the presence or absence of an ongoing contractual relationship or agreement;
- the nature of the services (e.g., whether they involved any representational services or other fiduciary duties); and
- the nature of compensation (e.g., one-time fee versus a retainer fee).

For example, the recusal obligation of Pledge paragraph 2 would not apply to an appointee who had provided consulting services on a technical or scientific issue, for three hours on a single day, pursuant to an informal oral agreement, with no representational or fiduciary relationship.[7] On the other hand, an appointee who had an ongoing contractual relationship to provide similar services as needed over the course of several months would be covered. In closer cases, OGE believes ethics officials should err on the side of coverage, with the understanding that waivers, under section 3 of the Order, remain an option in appropriate cases.

The Relationship of Paragraph 2 of the Pledge to the Existing Impartiality Regulations

Paragraph 2 of the Pledge is not merely an extension of the existing impartiality requirements of subpart E of the Standards of Ethical Conduct, although in some circumstances the restrictions of the Pledge and the existing impartiality restrictions could align. The effect of any overlap is that all of the relevant restrictions apply to the appointee and should be acknowledged in the appointee's ethics agreement and considered when granting a waiver or authorization under either set of restrictions.

[7] Note that appointees still will have a covered relationship for one year after they provided any consulting services, under the OGE impartiality rule, 5 C.F.R. § 2635.502(b)(1)(iv). Therefore, the OGE rule may require an appointee to recuse from certain matters (or obtain an authorization, as appropriate), even if the Pledge does not extend the recusal for an additional year. Indeed, the presence of the OGE rule as a "fall-back" was a factor in the decision to exclude certain de minimis consulting services from the Pledge in the first place.

Paragraph 2 of the Pledge and Impartiality Regulations Differ and Overlap

An appointee's commitments under paragraph 2 of the Pledge both overlap and diverge from the existing impartiality regulations in important ways depending upon the facts of each appointee's circumstances. The following highlights some of the key areas in which paragraph 2 of the Pledge and the existing impartiality restrictions differ. In addition, OGE has developed a chart as a quick reference tool to identify the key differences among the existing impartiality regulations and paragraph 2 of the Pledge. *See* **Attachment 1**.

Paragraph 2 of the Pledge is at once more expansive and more limited than the existing impartiality restrictions found at 5 C.F.R. §§ 2635.502, 2635.503. For example, an appointee is subject to impartiality restrictions based on his covered relationships with a much broader array of persons[8] than to the restrictions of paragraph 2, which are limited to the appointee's former employer and former clients. Thus, for instance, if the appointee has served as a contractor, but not in any of the roles described in the definitions of former employer or former client in the Executive Order, then the appointee may have recusal obligations under 5 C.F.R. §§ 2635.502 and 2635.503, but not under Pledge paragraph 2. Conversely, Pledge paragraph 2 is more expansive than the definition of covered relationship in section 2635.502 because the Pledge provision looks back two years to define a former employer or former client and it imposes a two-year recusal obligation after appointment, both of which are considerably broader than the one-year focus of section 2635.502(b)(1)(iv). Pledge paragraph 2 also is more expansive in that the recusal obligation may apply to certain communications and meetings that do not constitute particular matters involving specific parties as that phrase is used in sections 2635.502 and 2635.503.[9]

On the subject of recusal periods alone, ethics officials will need to be especially attentive to the possible variations, as it may be possible for as many as three periods to overlap. For example, an appointee could have: a one-year recusal, under 5 C.F.R. § 2635.502, from the date she last served a former employer; a two-year recusal, under section 2635.503, from the date she received an extraordinary payment from that same former employer; and a two-year recusal with respect to that former employer, under Pledge paragraph 2, from the date of her appointment.

Specific Recusals under Paragraph 2 of the Pledge are Not Required to be Memorialized in an Appointee's Ethics Agreement.

Executive Order 13490 does not require recusals under paragraph 2 of the Pledge to be addressed specifically in an appointee's ethics agreement, unlike recusals under paragraph 3 of

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[8] See definition of "covered relationship" at 5 C.F.R. § 2635.502(b)(1).

[9] *Compare* Exec. Order No. 13490, sec. 2(h)(definition broader than post-employment regulation); *with* 5 C.F.R. § 2635.502(b)(3)(defining particular matter involving specific parties solely by reference to post-employment regulations).

the Pledge. *See* Exec. Order No. 13490 sec. 4(a).[10] However, if an appointee will have a written ethics agreement addressing other commitments, OGE requires that the following language be inserted in that written ethics agreement in order to ensure that the appointee is aware of her commitments and restrictions under both her ethics agreement and the Pledge.

> Finally, I understand that as an appointee I am required to sign the Ethics Pledge (Exec. Order No. 13490) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this and any other ethics agreement.

Written ethics agreements will continue to address section 2635.502 and 2635.503 issues separately using the model provisions from OGE's "Guide to Drafting Ethics Agreements for PAS Nominees." Thus, regardless of paragraph 2 of the Pledge, the one-year "covered relationship" under the OGE impartiality rule remains in effect and may require an appointee to recuse from certain matters, even if the Pledge does not extend the recusal for an additional year. *See* 5 C.F.R. § 2635.502(b)(1)(iv).

The Pledge and Impartiality Regulations Waiver Provisions

Designated Agency Ethics Officials have been designated to exercise the waiver authority for the Ethics Pledge, under section 3 of Executive Order 13490, in addition to their existing role in the issuance of impartiality waivers and authorizations. DAEOgram DO-09-008; 5 C.F.R. §§ 2635.502(d), 2635.503(c). Generally, it is expected that waivers of the various requirements of the Pledge will be granted sparingly. *See* OGE DAEOgram DO-09-008. Although paragraph 2 clearly adds new limits on the revolving door, those limits are not intended to bar the use of qualified appointees who have relevant private sector experience in their fields of expertise. Therefore, at least where the lobbyist restrictions of paragraph 3 of the Pledge are not implicated, OGE expects that DAEOs will exercise the waiver authority for paragraph 2 in a manner that reasonably meets the needs of their agencies. In this regard, DAEOs already have significant experience in determining whether authorizations under 5 C.F.R. § 2635.502(d) are justified, and DAEOs should use similar good judgment in decisions about whether to waive paragraph 2 of the Pledge. Of course, any such waiver decisions still must be made in consultation with the Counsel to the President. Exec. Order No. 13490, sec. 3. Additional details on the standards for issuing a waiver of provisions of Pledge paragraph 2, as well as on issues related to the interaction of the waiver provisions of the impartiality regulations and relevant paragraphs of the Pledge, are reserved for future guidance.

[10] An ethics agreement is defined as "any oral or written promise by a reporting individual to undertake specific actions in order to alleviate an actual or apparent conflict of interest," such as recusal from participation in a particular matter, divestiture of a financial interest, resignation from a position, or procurement of a waiver. 5 C.F.R. § 2634.802.

ATTACHMENT 1

OGE developed the following table as a quick reference tool to highlight the main differences between paragraph 2 of the Pledge and existing impartiality regulations. It is not intended to be a substitute for thorough analysis, but we hope you find it useful.

		5 C.F.R. § 2635.502	**5 C.F.R. § 2635.503**	**Paragraph 2 of the Pledge**
Relationship:	Former Employer	Any person which the employee served, within the last year, as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; no exclusion for governmental entities (other than Federal)	Any person which the employee served as an officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee; no exclusion for governmental entities (other than Federal)	Two years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner; contractor and consultant omitted from list (although consultant added below under former client); is not a former employer if governmental entity
	Former Client	Clients of attorney, agent, consultant, or contractor covered same way as former employer, under 5 C.F.R. § 2635.502(b)(1)(iv)	Clients of attorney, agent, consultant, or contractor covered same way as former employer, under 5 C.F.R. § 2635.503(b)(2)	Two years prior to date of appointment served as an agent, attorney, or consultant. Is not former client if: • Only provided speech/similar appearance (including de minimis consulting) • Only provided contracting services other than as agent, attorney, or consultant • Served governmental entity
	Business and Personal/ Covered Relation-ship	In addition to former employers/ clients discussed above, includes various <u>current</u> business and personal relationships, as listed in 5 C.F.R. § 2635.502(b)(1)	No equivalent concept	No equivalent concept
Prohibition:	May not participate in particular matter involving specific parties if:	Reasonable person with knowledge of facts would question impartiality	Extraordinary payment from former employer	Includes communication by former employer or former client unless matter of general applicability or non-particular matter and open to all interested parties
Length of recusal:		1 year from the end of service	2 years from date of receipt of payment	2 years from date of appointment

05 x 1

Letter to a Designated Agency Ethics Official
dated February 10, 2005

This is in response to your letter of February 9, 2005, in which you inquire whether the deliberations of the President's Advisory Panel on Federal Tax Reform would constitute particular matters for purposes of 18 U.S.C. § 208. The first meeting of the Panel is scheduled for February 16, and the need for a prompt resolution of the question is apparent. Your letter follows up on earlier telephone conversations in which my Office advised that the proposed work of the Panel, as described to us, did not constitute a particular matter or particular matters within the meaning of the conflict of interest statute. We continue to be of the same view.

Pursuant to Executive Order 13369 (January 7, 2005), the Panel is charged with producing a single report that will address a range of "revenue neutral policy options" for legislative reform of the Federal tax system. The contemplated scope of the report is quite broad, as indicated by the three guiding principles in the Executive order: the options should "(a) simplify Federal tax laws to reduce the costs and administrative burdens of compliance with such laws; (b) share burdens and benefits of the Federal tax structure in an appropriately progressive manner while recognizing the importance of homeownership and charity in American society; and (c) promote long-run economic growth and job creation, and better encourage work effort, saving, and investment, so as to strengthen the competitiveness of the United States in the global marketplace." Executive Order, § 3. The Executive order only prescribes that "at least one option submitted by the Advisory Panel should use the Federal income tax as the base for its recommended reforms." *Id.* Consistent with this broad mandate, your letter indicates that Panel deliberations are expected "to focus on a wide range of tax matters--including both matters that have the potential to affect all taxpayers (*e.g.*, the alternative minimum tax and the compliance burdens for large, small and individual taxpayers) as well as matters that specifically and uniquely affect taxpayers comprised of

industry sectors (*e.g.*, depletion allowance for the oil and gas industries)."

As you know, section 208(a) prohibits employees from participating personally and substantially in any "particular matter" in which they have a personal or imputed financial interest. Under the interpretive regulations issued by the Office of Government Ethics, "[t]he term 'particular matter' includes only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons." 5 C.F.R. § 2640.103(a)(1). The phrase generally is understood to include matters of general applicability that are narrowly focused on the interests of a discrete industry, such as the meat packing industry or the trucking industry. *E.g.*, 5 C.F.R. § 2640.103(a)(1) (example 3); 5 C.F.R. § 2635.402(b)(3) (example 2). However, the term does not extend to the "consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons." § 2640.103(a)(1).

The work of the Panel, as described above, fits comfortably within the latter exclusion for consideration of broad policy options directed to the interests of a large and diverse group of persons. Indeed, the Panel's report is expected to address issues affecting every taxpayer in the United States. In this regard, the matter is analogous to example 8 following section 2640.103(a)(1), in which the consideration of a legislative proposal for broad health care reform is held not to be a particular matter because it is intended to affect every person in the United States. However, your letter refers to the preamble discussion of this example in the final rule and indicates that it suggests that the larger legislative proposal may be broken down into different constituent parts that might be viewed as separate particular matters in their own right. 61 *Fed. Reg.* 66830, 66832 (December 18, 1996). You note that some of the many tax policy options to be considered by the Panel will focus more narrowly on discrete industries and question whether the language in the preamble means that the consideration of these options should be treated as separate particular matters, apart from the overall report.

It was not OGE's intention that example 8 and the preamble should be read as requiring that broad legislative proposals of this type be fractionated into separate provisions or issues for purposes of identifying particular matters. Such an approach would prove little, since the consideration of most matters of

broad public policy can be carved up into successively finer and more focused parts: after all, much of policymaking inevitably involves the consideration of how different aspects of an overall proposal will affect different constituencies in a pluralistic democracy. Nor do we think it would be workable to employ a variation of what one court has criticized as an "elastic approach" to identifying particular matters, which is contingent on the part of the overall matter in which the particular individual happened to be involved. *Van Ee v. EPA*, 202 F.3d 296, 309 (D.C. Cir. 2000).[1] It would not be logical to conclude that an employee could participate in considering the overall legislative proposal but not its constituent parts.

In any event, the text of example 8 does not state that work on the broad health care proposal must be divided up into separate particular matters. It simply indicates that "consideration *and implementation*, *through regulations*, of a section of the health care bill" that limits prices for prescription drugs would be a particular matter that is focused on the pharmaceutical industry. § 2640.103(a)(1) (example 8) (emphasis added); *see also* 60 *Fed. Reg.* 47208, 47210 (September 11, 1995) (preamble to proposed rule) (broad policy matters may *later* become particular matters when implemented in a way that distinctly affects specific persons or groups of persons). At most, the preamble language indicates only that there may be *other* conceivable situations where a narrowly focused provision in a larger legislative proposal should not be viewed as merely an integral part of the broader policy deliberations. Although OGE has not had occasion to render any opinions on such situations, an example might be (depending on the facts) a private relief bill that becomes attached to a larger legislative vehicle focused on an unrelated subject.

Apart from example 8, the OGE regulations contain another example that appears to be almost indistinguishable from the work of the Panel. Example 5 following section 2640.103(a)(1) states that "deliberations on the general merits of an omnibus bill such as the Tax Reform Act of 1986 are not sufficiently

[1] *Van Ee* involved the use of the same phrase, "particular matter," in a related conflict of interest statute, 18 U.S.C. § 205. In interpreting the same regulatory definition of particular matter discussed above, the Court in that case criticized the Government for focusing on "aspects of the [Government matter] that might ultimately affect specific groups or individuals, rather than upon the overall focus of the proceeding itself." 202 F.3d at 309.

focused on the interests of specific persons, or a discrete and identifiable group of persons to constitute participation in a particular matter." As my Office explained in our earlier telephone conversations, the Tax Reform Act of 1986 itself contained numerous provisions, which, if considered alone, might have constituted separate particular matters, such as specific tax provisions for the oil, gas and pharmaceutical industries. *See* Pub. L. 99-514, October 22, 1986. However, the inclusion of such topics simply as components of a much more global tax reform proposal meant that the Tax Reform Act, like the comprehensive tax reform deliberations of the new Panel, must be viewed as too broadly focused to be considered a particular matter.

If you have any further questions about this matter, feel free to contact my Office.

Sincerely,

Marilyn L. Glynn
Acting Director

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

October 4, 2006

DO-06-029

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: "Particular Matter Involving Specific Parties," "Particular Matter," and "Matter"

Perhaps no subject has generated as many questions from ethics officials over the years as the difference between the phrases "particular matter involving specific parties" and "particular matter." These phrases are used in the various criminal conflict of interest statutes to describe the kinds of Government actions to which certain restrictions apply. Moreover, because these phrases are terms of art with established meanings, the Office of Government Ethics (OGE) has found it useful to include these same terms in various ethics rules. A third term, "matter," also has taken on importance in recent years because certain criminal post-employment restrictions now use that term without the modifiers "particular" or "involving specific parties."

It is crucial that ethics officials understand the differences among these three phrases. OGE's experience has been that confusion and disputes can arise when these terms are used in imprecise ways in ethics agreements, conflict of interest waivers, and oral or written ethics advice. Therefore, we are issuing this memorandum to provide guidance in a single document about the meaning of these terms and the distinctions among them.

Because the three phrases are distinguished mainly in terms of their relative breadth, the discussion below will proceed from the narrowest phrase to the broadest.

Particular Matter Involving Specific Parties

The narrowest of these terms is "particular matter involving specific parties." Depending on the grammar and structure of the particular statute or regulation, the wording may appear in slightly different forms, but the meaning remains the same, focusing primarily on the presence of specific parties.

1. Where the Phrase Appears

This language is used in many places in the conflict of interest laws and OGE regulations. In the post-employment statute, the phrase "particular matter . . . which involved a specific party or parties" is used to describe the kinds of Government matters to which the life-time and two-year representational bans apply. 18 U.S.C. § 207(a)(1), (a)(2). Occasionally, ethics officials have raised questions because section 207 includes a definition of the term "particular matter," section 207(i)(3), but not "particular matter involving specific parties"; however, it is important to remember that each time "particular matter" is used in section 207(a), it is modified by the additional "specific party" language.[1]

In addition to section 207(a), similar language is used in 18 U.S.C. §§ 205(c) and 203(c). These provisions describe the limited restrictions on representational activities applicable to special Government employees (SGEs) during their periods of Government service.[2]

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[1] For a full discussion of the post-employment restrictions, see OGE DAEOgram DO-04-023, at https://www.oge.gov/Web/oge.nsf/Resources/DO-04-023:+Summary+of+18+U.S.C.+§+207.

[2] These restrictions on SGEs are discussed in more detail in OGE DAEOgram DO-00-003, at https://www.oge.gov/Web/oge.nsf/Resources/DO-00-003:+Summary+of+Ethical+Requirements+Applicable+to+Special+Government+Employees.

As explained below, 18 U.S.C. § 208 generally uses the broader phrase "particular matter" to describe the matters from which employees must recuse themselves because of a financial interest. However, even this statute has one provision, dealing with certain Indian birthright interests, that refers to particular matters involving certain Indian entities as "a specific party or parties." 18 U.S.C. § 208(b)(4); see OGE Informal Advisory Letter 00 x 12. Moreover, OGE has issued certain regulatory exemptions, under section 208(b)(2), that refer to particular matters involving specific parties. 5 C.F.R. § 2640.202(a), (b). Likewise, the distinction between particular matters involving specific parties and broader types of particular matters (i.e., those that have general applicability to an entire class of persons) is crucial to several other regulatory exemptions issued by OGE under section 208(b)(2). 5 C.F.R. §§ 2640.201(c)(2), (d); 2640.202(c); 2640.203(b), (g).

Finally, OGE has used similar language in various other rules. Most notably, the provisions dealing with impartiality and extraordinary payments in subpart E of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) refer to particular matters in which certain persons are specific parties. 5 C.F.R. §§ 2635.502; 2635.503. OGE also uses the phrase to describe a restriction on the compensated speaking, teaching and writing activities of certain SGEs. 5 C.F.R. § 2635.807(a)(2)(i)(4).

2. What the Phrase Means

When this language is used, it reflects "a deliberate effort to impose a more limited ban and to narrow the circumstances in which the ban is to operate." Bayless Manning, Federal Conflict of Interest Law 204 (1964). Therefore, OGE has emphasized that the term "typically involves a specific

proceeding affecting the legal rights of the parties, or an isolatable transaction or related se t of transactions between identified parties." 5 C.F.R. § 2640.102(1). [3] Examples of particular matters involving specific parties include contracts, grants, licenses, product approval applications, investigations, and litigation. It is important to remember that the phrase does not cover particular matters of general applicability, such as rulemaking, legislation, or policy-making of general applicability.[4]

Ethics officials sometimes must deci de when a particular matter first involves a specific party. Many Government matters evolve, sometimes starting with a broad concept, developing into a discrete program, and eventually involving specific parties. A case-by-case analysis is required to determine at which stage a particular matter has sufficiently progressed to involve

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[3] This definition, found in OGE's regulations implementing 18 U.S.C. § 208, differs slightly from the definition found in the regulations implementing a now-superseded version of 18 U.S.C. § 207, although this is more a point of clarification than substance. Specifically, the old section 207 regulations referred to "identifiable" parties, 5 C.F.R. § 2637.201(c)(1), whereas the more recent section 208 rule refers to "identified" parties. As explained in the preamble to OGE's proposed new section 207 rule: "The use of 'identified,' rather than 'identifiable,' is intended to distinguish more clearly between particular matters involving specific parties and mere 'particular matters,' which are described elsewhere as including matters of general applicability that focus 'on the interests of a discrete and identifiable class of persons' but do not involve specific parties. [citations omitted] The use of the term 'identified,' however, does not mean that a matter will lack specific parties just because the name of a party is not disclosed to the Government, as where an agent represents an unnamed principal." 68 Feder al Register 7844, 7853-54 (February 18, 2003).

[4] Usually, rulemaking and legislation are not covered, unless they focus narrowly on identified parties. See OGE Informal Advisory Opinions 96 x 7 ("rare" example of rulemaking that involved specific parties); 83 x 7 (private relief legislation may involve specific parties).

specific parties. The Government sometimes identifies a specific party even at a preliminary or informal stage in the development of a matter. E.g., OGE Informal Advisory Letters 99 x 23; 99 x 21; 90 x 3.

In matters involving contracts, grants and other agreements between the Government and outside parties, the general rule is that specific parties are first identified when the Government first receives an expression of interest from a prospective contractor, grantee or other party. As OGE explained recently in Informal Advisory Letter 05 x 6, the Government sometimes may receive expressions of interest from prospective bidders or applicants in advance of a published solicitation or request for proposals. In some cases, such matters may involve specific parties even before the Government receives an expression of interest, if there are sufficient indications that the Government actually has identified a party. See OGE Informal Advisory Letter 96 x 21.

Particular Matter

Despite the similarity of the phrases "particular matter" and "particular matter involving specific parties," it is necessary to distinguish them. That is because "particular matter" covers a broader range of Government activities than "particular matter involving specific parties." Failure to appreciate this distinction can lead to inadvertent violations of law. For example, the financial conflict of interest statute, 18 U.S.C. § 208, generally refers to particular matters, without the specific party limitation. If an employee is advised incorrectly that section 208 applies only to particular matters that focus on a specific person or company, such as an enforcement action or a contract, then the employee may conclude it is permissible to participate in other particular matters, even t hough the la w prohibits such participation.

1. Where the Phrase Appears

In addition to 18 U.S.C. § 208, several other statutes and regulations use the term "particular matter." [5] The representational restrictions applicable to current employees (other than SGEs), under 18 U.S.C. §§ 203 and 205, apply to particular matters.[6] As mentioned above, section 207 also contains a definition of "particular matter." [7] However, where the phrase is used in the post-employment prohibitions in

[5] The relevant language in 18 U.S.C. § 208(a) is "a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter" (emphasis added).

[6] The prohibition in 18 U.S.C. § 205(a)(2) actually uses the phrase "covered matter," but that term is in turn defined as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter," 18 U.S.C. § 205(h)(emphasis added).

[7] The definition in 18 U.S.C. § 207(i)(3) provides: "the term 'particular matter' includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding." This language differs slightly from other references to "particular matter" in sections 203, 205 and 208, in part because the list of matters is not followed by the residual phrase "or other particular matter." However, OGE does not believe that the absence of such a general catch-all phrase means that the list of enumerated matters exhausts the meaning of "particular matter" under section 207(i)(3). The list is preceded by the word "includes," which is generally a term of enlargement rather than limitation and indicates that matters other than those enumerated are covered. See Norman J. Singer, 2A Sutherland on Statutory Construction 231-232 (2000).

section 207(a)(1) and (a)(2), it is modified by the "specific parties" limitation.[8]

The phrase "particular matter" is used pervasively in OGE's regulations. Of course, the term appears throughout 5 C.F.R. part 2640, the primary OGE rule interpreting and implementing 18 U.S.C. § 208. Similarly, it is used in 5 C.F.R. § 2635.402, which is the provision in the Standards of Conduct that generally deals with section 208. The phrase also is used throughout subpart F of the Standards of Conduct, which contains the rules governing recusal from particular matters affecting the financial interest of a person with whom an employee is seeking non-Federal employment. 5 C.F.R. §§ 2635.601-2635.606. Moreover, the phrase appears in the "catch-all" provision of OGE's impartiality rule, 5 C.F.R. § 2635.502(a)(2). See also 5 C.F.R. 2635.501(a).[9] Various other regulations refer to "particular matter" for miscellaneous purposes. E.g., 5 C.F.R. § 2635.805(a)(restriction on expert witness activities of SGEs); 5 C.F.R. § 2634.802(a)(1)(written recusals pursuant to ethics agreements).

2. What the Phrase Means

Although different conflict of interest statutes use slightly different wording, such as different lists of examples of particular matters, the same standards apply for determining what is a particular matter under each of the relevant statutes

[8] At one time, the post-employment "cooling-off" restriction for senior employees in 18 U.S.C. § 207(c) applied to particular matters, but the language was amended (and broadened) in 1989 when Congress removed the adjective "particular" that had modified "matter." See 17 Op. O.L.C. 37, 41-42 (1993).

[9] Generally, section 2635.502 focuses on particular matters involving specific parties, as noted above. However, section 2635.502(a)(2) provides a mechanism for employees to determine whether they should recuse from other "particular matters" that are not described elsewhere in the rule. In appropriate cases, therefore, an agency may require an employee to recuse from particular matters that do not involve specific parties, based on the concern that the employee's impartiality reasonably may be questioned under the circumstances.

and regulations. See 18 Op. O.L.C. 212, 217-20 (1994). Particular matter means any matter that involves "deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons." 5 C.F.R. § 2640.103(a)(1)(emphasis added). It is clear, then, that particular matter may include matters that do not involve parties and is not "limited to adversarial proceedings or formal legal relationships." Van Ee v. EPA, 202 F.3d 296, 302 (D.C. Cir. 2000).

Essentially, the term covers two categories of matters: (1) those that involve specific part ies (described more fully above), and (2) those that do not involve specific parties but at least focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession. OGE regulations sometimes refer to the second category as "particular matter of general applicability." 5 C.F.R. § 2640.102(m). This category can include legislation and policymaking, as long as it is narrowly focused on a discrete and identifiable class. Examples provided in OGE rules include a regulation applicable only to meat packing companies or a regulation prescribing safety standards for trucks on interstate highways. 5 C.F.R. §§ 2640.103(a)(1)(example 3); 2635.402(b)(3)(example 2). Other examples may be found in various opinions of OGE and the Office of Legal Counsel, Department of Justice. E.g., OGE Informal Advisory Letter 00 x 4 (recommendations concerning specific limits on commercial use of a particular facility); 18 Op. O.L.C. at 220 (determinations or legislation focused on the compensation and work conditions of the class of Assistant United States Attorneys).

Certain OGE rules recognize that particular matters of general applicability sometimes may raise fewer conflict of interest concerns than particular matters involving specific

parties.[10] Therefore, while both categories are included in the term "particular matter," it is often necessary to distinguish between these two kinds of particular matters. Of course, in many instances, the relevant prohibitions apply equally to both kinds of particular matters. This is the case, for example, in any application of 18 U.S.C. § 208 where there is no applicable exemption or waiver that distinguishes the two.

It is important to emphasize that the term "particular matter" is not so broad as to include every matter involving Government action. Particular matter does not cover the "consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons." 5 C.F.R. § 2640.103(a)(1). For example, health and safety regulations applicable to all employers would not be a particular matter, nor would a comprehensive legislative proposal for health care reform. 5 C.F.R. § 2640.103(a)(1)(example 4), (example 8). See also OGE Informal Advisory Letter 05 x 1 (report of panel on tax reform addressing broad range of tax policy issues). Although such actions are too broadly focused to be particular matters, they still are deemed "matters" for purposes of the restrictions described below that use that term.

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[10] As noted above, OGE's imparti ality rule generally focuses on particular matters involving specific parties. See OGE Informal Advisory Letter 93 x 25 (rulemaking "would not, except in unusual circumstances covered under section 502(a)(2), raise an issue under section 502(a)"). Furthermore, as also discussed above, several of the regulatory exemptions issued by OGE under 18 U.S.C. § 208(b)(2) treat particular matters of general applicability differently than those involving specific parties. The preamble to the original proposed regulatory exemptions in 5 C.F.R. part 2640 explains: "The regulation generally contains more expansive exemptions for participation in 'matters of general applicability not involving specific parties' because it is less likely that an employee's integrity would be compromised by concern for his own financial interests when participating in these broader matters." 60 Federal Register 47207, 47210 (September 11, 1995). Of course, Congress itself has limited certain conflict of interest restrictions to the core area of particular matters that involve specific parties. E.g., 18 U.S.C. § 207(a)(1), (a)(2).

A question that sometimes arises is when a matter first becomes a "particular matter." Some matters begin as broad policy deliberations and actions pertaining to diverse interests, but, later, more focused actions may follow. Usually, a particular matter arises when the deliberations turn to specific actions that focus on a certain person or a discrete and identifiable class of persons. For example, although a legislative plan for broad health care reform would not be a particular matter, a particular matter would arise if an agency later issued implementing regulations focused narrowly on the prices that pharmaceutical companies could charge for prescription drugs. 5 C.F.R. § 2640.102(a)(1)(example 8). Similarly, the formulation and implementation of the United States response to the military invasion of an ally would not be a particular matter, but a particular matter would arise once discussions turned to whether to close a particular oil pumping station or pipeline operated by a company in the area where hostilities are taking place. 5 C.F.R. § 2640.102(a)(1)(example 7).

Matter

The broadest of the three terms is "matter." However, this term is used less frequently than the other two in the various ethics statutes and regulations to describe the kinds of Government actions to which restrictions apply.

1. Where the Phrase Appears

The most important use of this term is in the one-year post-employment restrictions applicable to "senior employees" and "very senior employees." 18 U.S.C. § 207(c), (d). In this context, "matter" is used to describe the kind of Government actions that former senior and very senior employees are prohibited from influencing through contacts with employees of their former agencies (as well as contacts with Executive Schedule officials at other agencies, in the case of very senior employees). The unmodified term "matter" did not appear in these provisions until 1989, when section 207(c) was amended to replace "particular matter" with "matter" and section 207(d) was first enacted. Pub. L. No. 101-194, § 101(a), November 30, 1989. OGE also occasionally uses the term "matter" in ethics regulations, for example, in the description of teaching,

speaking and writing that relates to an employee's official duties. 5 C.F.R. § 2635.807(a)(2)(E)(1).

2. What the Phrase Means

It is clear that "matter" is broader than "particular matter." See 17 Op. O.L.C. at 41-42. Indeed, the term is virtually all-encompassing with respect to the work of the Government.[11] Unlike "particular matter," the term "matter" covers even the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons. Of course, the term also includes any particular matter or particular matter involving specific parties.

Nevertheless, it is still necessary to understand the context in which the term "matter" is used, as the context itself will provide some limits. In 18 U.S.C. § 207(c) and (d), the post-employment restrictions apply only to matters "on which [the former employee] seeks official action." Therefore, the only matters covered will be those in which the former employee is seeking to induce a current employee to make a decision or otherwise act in an official capacity.

[11] A now-repealed statute, 18 U.S.C. § 281 (the predecessor of 18 U.S.C. § 203), used the phrase "any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter" (emphasis added). One commentator noted that the term "matter" in section 281 was "so open-ended" that it raised questions as to what limits there might be on the scope. Manning, at 50-51. Manning postulated that some limits might be inferred from the character of the matters listed before the phrase "or other matter." Id. at 51. Whatever the force of this reasoning with respect to former section 281, the same could not be said with respect to 18 U.S.C. § 207(c) or (d), as neither of these current provisions contains an exemplary list of covered matters.

From: David Bernhardt
To: de la Vega, Scott
Cc: Daniel Jorjani; Heather Gottry; McDonnell, Edward
Subject: Re: Legal Categorization of CVP/SWP Issues
Date: Wednesday, February 20, 2019 8:02:26 AM

Scott: Thank you for analysis and helpful suggestions. I will instruct the Chief of Staff to ensure that we are consistently implementing your recommendations. I thank you and your entire team for the time and effort they put into addressing these questions.

Thanks,
David Bernhardt

Sent from my iPhone

On Feb 19, 2019, at 8:03 PM, de la Vega, Scott <scott.delavega@sol.doi.gov> wrote:

> Acting Secretary Bernhardt:
>
> Recently, you requested that my office examine prior ethics advice and counsel you had received from the Departmental Ethics Office (DEO) in regards to issues, decisions, and/or actions pending at the DOI involving the Central Valley Project (CVP) and the State Water Project (SWP) in California. You have also asked for my recommendations on any additional best practices to implement to fully ensure that you are in compliance with your Ethics Agreement, Executive Order 13770 (the "Ethics Pledge"), and all other ethics laws and regulations.
>
> Attached, please find a detailed memorandum wherein the DEO reviews and explains the prior guidance you have received from this office and, of utmost importance, categorizes CVP and SWP issues as "Matters," "Particular Matters of General Applicability," or "Particular Matters Involving Specific Parties." These legal categorizations are critical in determining whether an official complies with the various ethics rules. Reports that conflate these categories are sometimes confusing, however, the legal analysis and conclusion that Public Law 114-322 is not a "particular matter" and that both the Notice of Intent to Prepare a Draft EIS and the development of a 2019 Biological Assessment are "matters," not "particular matters" are supported by Federal law and Office of Government Ethics opinions. Consequently, these broad matters are outside the scope of paragraph 7 of the Ethics Pledge despite colloquially sounding like a "specific issue area."
>
> Going forward, you and your staff should continue to consult with my office in advance of your participation in any matter that is

potentially within the scope of your Ethics Agreement, the Ethics Pledge, or any other ethics laws or regulations. In addition, to eliminate any potential for miscommunication, misunderstanding or error, I have instructed my staff that all guidance to you be in writing before you decide to participate in a decision or action that reasonably appears to come within the purview of your legal ethics obligations. The implementation of these two recommendations will facilitate addressing any future question raised by your participation in a "matter," "particular matter of general applicability," or a "particular matter involving specific parties."

Finally, I am attaching reference materials that highlight many of the concepts discussed in the memorandum. Please let me know if you have any questions or would like to discuss any of these issues further and thank you for your conscientious approach to ethics compliance.

Scott A. de la Vega

Director, Departmental Ethics Office

& Designated Agency Ethics Official

Office of the Solicitor

U.S. Department of the Interior | MIB 5309

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